BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A
JUDGE, NO. 01-244
CHARLES W. COPE **CASE NO.: SC01-2670**
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MOTION TO DISMISS, FOR DISCOVERY AND FOR HEARING ON THE GROUNDS OF SELECTIVE PROSECUTION AND VINDICTIVE PROSECUTION

COMES NOW the Respondent, Charles Weaver Cope, and through his counsel moves this Court to dismiss the charges in this case on the grounds that the Judicial Qualifications Commission is both selectively and vindictively prosecuting the Respondent on these charges[1] in violation of the equal protection and due process clauses and the First and Sixth Amendments of the United States Constitution and the equal protection and due process clause in Article I, Sections 4 and 5 of the Florida Constitution. Respondent also moves this Court for discovery relevant to this motion and for a hearing.

SUMMARY

1. This is a case in which a circuit judge who has never been previously disciplined and who enjoys a high reputation amongst the bar which appears before him, had too much to drink (something for which he is deeply sorry and for which he has conscientiously sought treatment) and to his everlasting shame and that of his family, engaged in a momentary indiscretion, to which he was not committed, and

[1] This pleading addresses only Counts I, II, IV, V and VI. Count III is the subject of a separate motion filed contemporaneously herewith.

which he stopped before it went too far. While the only evidence supports the Judge's story, a headline-

making media following the precedent of the Queen of Hearts in Alice in Wonderland and expanding on other courthouse scandals has widely publicized it as a lurid attempt by an immoral judge to break into a room of women in order to rape them and demanded the Judge's head. It has been prosecuted without investigation in precisely the same way by a group of individuals singed by prior media attacks to a point where public outcry rather than competent evidence foretells positions. In many respects it is an example of something which has a cherished place in our society, the media's right to speak without sound basis. In every respect it demands something which is an essential part of our system of justice - - the ability to close the outside doors on emotional cain and fuss and focus on facts, law and justice. This is not about who is in charge of our community. It is about justice. It is not about the power to prosecute. It is about the abuse of that power. Most of all it is about the integrity of an independent judiciary.

2. On April 5, 2001, Judge Cope was placed under "citizen's arrest" by a 32 year old woman on a misdemeanor charge of "prowling." She accused him of attempting to enter her locked hotel room using a room key that she had previously lost. The Deputy District Attorney filed an additional charge of "peering into an occupied dwelling." No sworn testimony was taken prior to filing the charges.

3. The arrest was widely publicized in local media, replete with false statements by police and prosecutors in California.

4. Judge Cope was offered a plea of no contest to the prowling charge which he declined because he was innocent. In retaliation the Deputy District Attorney

filed additional charges of battery, theft of the hotel room key, and aggravated trespass in September 2001. Again no sworn testimony was taken.

5. In her statement to police, the Woman accused Judge Cope of "forceful sexual advances, touching her breasts, kiss[ing] her and inserting his tongue in her mouth" on a beach the night before the prowling incident. However, in a tape recorded statement given to the District Attorney's Office on June 15, 2001, the Woman **totally recanted** the allegations. That statement established that no battery whatsoever occurred; and yet the Deputy District Attorney filed a battery charge months later in retaliation.

6. A media frenzy ensued because of the sensational nature of the charges. Judge Cope was viciously attacked and ridiculed in news articles, editorials and opinion columns in the Tampa Tribune and St. Petersburg Times. This media attack on Judge Cope was coupled with vehement attacks on the JQC for assertedly protecting miscreant judges including Judge Cope and Judge Robert Bonanno. The attacks on the JQC reached such a pitch that the Speaker of the Florida House of Representatives announced unprecedented impeachment proceedings against Judges Cope and Bonanno in order to remove them from office and thereby do the job that the impliedly corrupt JQC was refusing to do.

7. On October 22, 2001, Judge Cope's counsel requested that the Investigative Panel investigate the allegation. The panel however refused to investigate and returned formal charges against Judge Cope on December 6, 2001. Counts II,

III, and IV essentially mirrored the identical charges in California. Count III, the subject of a separate motion to dismiss, incorporated the battery allegation in California. At the time the charges were filed the only competent evidence before the panel was exculpatory as to Judge Cope.

8. Thereafter Special Counsel for the JQC admitted that no investigation was conducted. General Counsel for the JQC, Thomas MacDonald ("MacDonald"), likewise subsequently admitted no investigation was conducted. His stated rationale was that the panel "had no choice" because Judge Cope had been arrested. He further stated "we had to do something."

9. From December through to the present Special Counsel conducted the prosecution of this matter at the direction of MacDonald. Throughout, concerted efforts were made to further publicly humiliate Judge Cope in order to force his resignation; to conceal and obstruct discovery of perjury and misconduct by the JQC's principal witnesses; to improperly manipulate the discovery process to facilitate a conviction in California in order to force Judge Cope's resignation; to abuse discovery rules to seek to compel medical records for Judge Cope's entire life; and to open a "sham" investigation into Judge Cope's "fitness for office."

10. In furtherance of these unconstitutional objectives, Special Counsel filed a false affidavit before the Hearing Panel, falsely told his principal witnesses that Judge Cope's co-counsel had reported a threat to "terrorize" the witnesses at their deposition, urged them to secure private counsel to obstruct and prevent proper and

relevant inquiry, and falsely told the presiding judge that such inquiry was abusive and improper. Special Counsel also, at the direction of MacDonald, instigated a sham "new investigation" by the Investigative Panel on the false pretext that Judge Cope was mentally unfit for office and had been hospitalized on a "suicide watch;" and attacked the character of Judge Cope's counsel.

11. In furtherance of that sham investigation, Special Counsel contacted Judge Cope's former criminal defense attorney in California to obtain confirmation of the supposed hospitalization on suicide watch. This was done without notice to Judge Cope or permission. When the information sought was not forthcoming, Special Counsel nevertheless tendered Judge Cope's former lawyer a false affidavit to sign coupled with the threat of subpoena for deposition. Despite his certain knowledge that the predicate hospitalization never happened, Special Counsel, on information and belief, reported such as fact to Judge Wolf and the Investigative Panel and secured an illegal and oppressive ex-parte order on March 13, 2002, ordering Judge Cope to submit to a mental health evaluation.

12. During the aforesaid pattern of illegal activity, Judge Cope's counsel complained of Special Counsel's unfairness. Special Counsel responded "I'm not concerned about fairness to Judge Cope. My job is to convict Judge Cope."

13. Realizing he made shockingly damaging admissions, Special Counsel attacked Judge Cope's co-counsel's character for truthfulness in a false affidavit later submitted to the court.

14. Ultimately efforts by Judge Cope's counsel, including depositions and interviews of material witnesses in five states, developed conclusive evidence that the JQC's principal witness repeatedly lied to police in California and under oath at deposition. Investigation also demonstrated conclusively that the charges brought by the JQC without investigation were untrue and could not be supported by any competent evidence. As a consequence Special Counsel and General Counsel admitted on March 22, 2002, to Judge Cope and his counsel that they could not prove Counts II, IV and V of the formal charges and the majority of the allegations in Count I. Further they admitted they were compelled to dismiss those charges. However they insisted that Judge Cope plead guilty to Count III and certain allegations in connection therewith which the evidence established were not true. Judge Cope refused because the evidence clearly and convincingly established the allegation was not true and in fact did not occur.

15. Thereafter, MacDonald advised co-counsel Louis Kwall that the JQC instructed that the prosecution go forward on all charges, including those which admittedly could not be proven. MacDonald further relayed the threat that if Judge Cope went to trial he would be removed from office.

16. The charges in this case were filed without probable cause and without investigation solely in response to media pressure and the perceived need to satisfy the court of public opinion. Consequently, the charges were filed in bad faith. Judge Cope was singled out for prosecution because of the inflammatory nature of the

equally false charges filed in California. Judge Cope was also singled out for prosecution because of the adverse publicity surrounding the JQC's handling of the Bonanno matter, in which the JQC was criticized for exonerating Bonanno on a charge of inappropriate intimate conduct notwithstanding that the proof in that case established Bonanno engaged in an affair with a courthouse clerk over a course of years which was the subject of public scandal in the courthouse.

17. Judge Cope was further singled out for prosecution from other judges similarly situated in that the JQC insists on continuing to prosecute him on charges for which they know and have admitted they have insufficient evidence. This further evidences bad faith. In addition, the conduct of the JQC throughout is vindictive and intended to "punish" Judge Cope at the expense of law and due process in order to protect political encroachment on the JQC's turf by the Florida House of Representatives, conceal the misconduct of the JQC in the manner in which this case was brought and prosecuted and force Judge Cope to resign. Prosecution of Judge Cope is further selective, discriminatory and vindictive in that the JQC has engaged in oppressive and illegal conduct intended to oppress and frustrate Judge Cope's right to trial on the charges, and has threatened that if he goes to trial, even on the charges that the JQC admitted it has insufficient evidence, he would be removed from office.

18. From March 22, 2002, through the present, the JQC has deliberately and maliciously refused to dismiss the charges which it has admitted cannot be

sustained in the evidence. This has been done to prevent the necessary dismissal of the California criminal charges, to expose Judge Cope to continued false and inflammatory media publicity and rebuke, all in an effort to compel his resignation.

FACTUAL BACKGROUND

19. The Respondent, the Honorable Charles Weaver Cope ("Cope") was first elected circuit court judge in and for the Sixth Judicial Circuit in November 1992. He was reelected for a six year term on November 1998. During his approximate 10 years on the circuit bench, Cope has never been the subject of any disciplinary proceeding on the part of the JQC.

20. In April 2001, Cope traveled to Carmel-by-the-Sea, California for the purpose of attending a judicial seminar. Cope registered at the LaPlaya Hotel where the conference was being held, and attended all sessions of the conference which culminated on April 5, 2001.

21. On the early morning hours of April 4, 2001, Cope was walking along a public street in Carmel when he overheard two women in apparent distress on the second floor balcony of the Normandy Inn, where the two women were registered guests in a single room. Judge Cope has admitted he was intoxicated at the time. The two women, a 32 year old veterinarian (the "Woman") and her 64 year old gynecologist mother (the "Mother") were locked out of their room. Cope approached the two and offered assistance. He was told they were locked out of their room and he assisted in searching for the room key, which could not be found. Cope then went

downstairs to the manager's office, accompanied by the Woman, and attempted to rouse the night manager to gain entrance into the room for the women. While standing outside of the night manager's office, the Woman asked Cope, "So, what do you think of a woman like me." She then proceeded to confide in Cope that she had a boyfriend who was married, that she had just had a recent abortion, and that after disclosing these facts to her mother, who she reported was an abusive alcoholic, the Mother was verbally abusing her. She further asserted to Cope that she wanted to get away from the Mother.

22. Cope returned to the second floor balcony with the Woman and offered his hotel room to the two in order for them to use the phone, or to sleep on his couch for the night. They accepted; and the three began walking to Cope's hotel. In route they were stopped by a local police officer, Phillip Nash, who offered them a ride to Cope's hotel. Upon arrival in Cope's hotel room, the officer began asking the two women questions for the purpose of completing a field interrogation report. The Mother, who was extremely intoxicated, became very angry and began arguing with the Woman and the police officer, hurling obscenities and vulgarities. The Woman returned vulgar epithets at the Mother and the noise was so loud it awakened a judge asleep in an adjoining hotel room who heard (and later reported to the JQC) the two women drunkenly hurling epithets at each other. The Mother demanded to be returned to her own hotel room. Cope suggested the Woman remain behind because of her earlier request to get away from the Mother and because he was witnessing the

very abuse the Woman had earlier complained of. The Woman however elected to return with the Mother. The police officer then took the two women back to the Normandy Inn in his squad car.

23. Thereafter Cope walked back to the Normandy Inn, knocked on the door, and invited the Woman to walk with him on the beach. She accepted. The two walked to the beach at approximately 1:30 a.m., April 4, 2001, and remained on the beach for approximately an hour. While on the beach the two walked, held hands, and talked about the matters that the Woman had earlier disclosed to Cope. Eventually, they waded in the surf together and briefly kissed. At all times the beach was deserted. The woman then expressed the desire to return with Cope to his hotel room and the two walked back to the LaPlaya Hotel where they entered Cope's private room. While in the room, the two engaged in brief foreplay and petting and the Woman partially disrobed. After a time the Woman indicated to Cope that she did not want to go any further as she was fearful of becoming pregnant again. The intimate conduct immediately ceased, and the Woman got dressed and returned to her hotel. During the brief encounter Cope was able to observe details concerning the Woman's intimate apparel and anatomy which he could not have known but for having observed them. At the time of her encounter with Cope, the Woman was carrying on an affair with a married student of hers at the University of California at Davis. This individual had intimate relations with the Woman immediately prior to and subsequent to her

encounter with Cope. He confirmed by affidavit the intimate details that Cope himself observed.

April 5, 2001

24. In the early morning hours of April 5, 2001, Cope was returning to his hotel from a late bite to eat and walk on the beach. Again, he has admitted he was intoxicated. Approximately a half block from his hotel he was stopped by a police officer and briefly detained. He cooperated with the police officer's request for a search of his person; and shortly thereafter another police officer drove up with the Woman in the backseat of his car. At that point the Woman shouted at Cope that he was under citizens arrest for "prowling." Cope was transported to the police station where he waived *Miranda* and cooperated in an interview with police. At that time Cope learned that the Woman had accused him of attempting to enter her hotel room earlier that evening by using a key. Cope denied the allegation. Cope revealed to the police the details of his encounter with the Woman the preceding evening, including her accompanying him to his hotel room where they became briefly intimate. The police then left the interrogation room and reported to the Woman, who had accompanied them to the police station and was remaining outside of the room, that Judge Cope had divulged her consensual conduct with him the previous evening. **At that point** the Woman invented an allegation that Judge Cope had made aggressive sexual advances against her on the beach including touching her breasts (plural), kissing her and inserting his tongue in her mouth. She stated she ran from Judge Cope back to her hotel room, and pounded on the door where her mother let her in.

25. Later on the morning of April 5, 2001, the police went to the hotel room at the Normandy Inn and interviewed the Woman in the presence of the Mother. **At that time** the Woman falsely reported that Cope "attempted to rape" her on the beach. The police asked her if Cope ever had an opportunity earlier that morning to obtain the room key which the Woman asserted was used by the person outside of her door to attempt to enter their room. The Woman stated she was too drunk and had not been paying attention to the key or anything else. The Woman was also asked if she was certain she had locked the door to her room. She stated that she was certain she had locked the door; and told the police that the individual on the other side of the door had "pushed" the door against the chain lock. The police found no damage whatsoever to the door or chain lock.[2]

26. Based on the Woman's unsworn reports to the police, the District Attorney for Monterey County, California, filed two misdemeanor charges against Cope alleging

"wandering, loitering or prowling" and "peering in to an occupied dwelling." Cope, through local counsel, entered a plea of not guilty to the charges.

27. On June 15, 2001, an investigator for the District Attorney's Office telephonically interviewed the Woman at her residence in Maryland. That interview

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[2] At deposition the Woman changed her story completely. She claimed she was basically guarding the key at all times. She claimed she did not lock the door and denied telling police she had. She also claimed the door was banging violently against the chain and the person on the other side was attempting to break through. The police officer testified if that had occurred, the fragile chain would have broken loose from its small anchoring screws.

was recorded. The transcript of that interview reflects that the Woman **totally recanted** the allegation of Cope's aggressive sexual advances on the beach. Rather, the Woman stated Cope was **not aggressive at all**. In fact, he never even kissed her on the beach; but merely attempted to on more than one occasion by leaning his face forward which she said she averted.

28. The Deputy District Attorney prosecuting the charges in California offered to allow Cope to enter a plea of "no contest" to a single charge of prowling. She advised Cope's attorney that if he did not accept such a plea, she would file additional charges.[3] The Deputy District Attorney concealed from Judge Cope's counsel at the time the June 15, 2001,

[3] For the purposes of this motion, disclosure of material statements made by the prosecutor during the course of settlement discussions are appropriate and necessary. See, e.g., *Bordenkircher v. Hayes*, 98 S.Ct. 663 (1979); *United States v. Goodwin*, 102 S.Ct. 2485 (1982).

statement recanting the allegations. Because he had not engaged in the conduct alleged, Cope refused to enter a no contest plea. Thereafter in September 2001, the Deputy District Attorney caused additional charges to be filed against Cope including 1) battery[4]; 2) aggravated trespass; and (3) theft of the women's hotel room key. These charges were widely publicized in local newspapers including the St. Petersburg Times and the Tampa Tribune.

29. Upon his return from California, Judge Cope did not report to anyone the above events believing that Woman's charge would not be prosecuted. The first person he discussed the events with was then Chief Judge Susan Schaeffer. Judge Schaeffer in turn reported the matter to incoming Chief Judge David Demers. He truthfully told her what happened. At the time, neither he, Judge Schaeffer or Judge Demers perceived a judicial duty to report the arrest by the Woman to the JQC.[5] Nor did they perceive any reason why Judge Cope should step down from the bench or disclose to anyone the matters he reported to Judge Schaeffer. Judge Cope did not knowingly violate any judicial duty or ethical considerations in this course of conduct. He knew that he was innocent of any wrongdoing; and had been arrested by a woman and not the police. He believed the charge would be promptly dismissed and feared that any publicity about the matter would irreparably destroy his reputation and would likewise unfairly undermine public confidence in the judiciary.

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[4] Notwithstanding the Woman's earlier admission to the prosecutor's own investigator that no "battery" occurred.

[5] Judge Schaeffer (and later Judge Demers) was subject to the constraints of Canon 3C(3) of the Code of Judicial Conduct, which provides: "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure - - - the proper performance of their other judicial responsibilities.

I. The JQC Investigative Panel brought formal charges against Judge Cope without conducting an investigation and without establishing probable cause in violation of Rule 6 of the Rules of the Florida Judicial Qualifications Commission, and relevant Federal and State constitutional protections

A. The formal charges were filed solely in response to inflammatory publicity and criticism of the JQC, without any evidentiary basis.

30. Because of the extent of publicity surrounding the criminal charges in California the JQC was publicly criticized in the newspapers and elsewhere for failing to take action against another judge (Hillsborough Circuit Judge Robert Bonanno). The issue became widely published and highly political. When the Cope matter came up the newspapers piled it on. Florida politicians in the House of Representatives announced that impeachment proceedings would be instituted against both Judge Bonnano and Cope.

31. An August 16, 2001, editorial in the Tampa Tribune asserted "Cope's behavior is doubly shocking. This is his second arrest and both occurred while he was attending out-of-town judicial functions." The editorial continued by falsely alleging that Judge Cope was accused "of trying to enter the hotel room of two women he had met." In that editorial, the Judicial Qualifications Commission was criticized for failing to take action

in connection with Judge Cope's previous DUI arrest (in which the charges were dismissed). The editorial admonished Judge Cope to resign.

32. The Tampa Tribune carried another article August 18th, again criticizing the JQC for taking no action in 1996 when Judge Cope was arrested on a DUI charge.

33. On September 6, 2001, the Tampa Tribune falsely reported that Judge Cope was "accused of peeping and prowling in a California hotel room where two women slept." The article further falsely alleged that Judge Cope would plead guilty to a lesser charge. Again the article repeatedly criticized the Judicial Qualifications Commission for taking no action in 1996.

34. Contemporaneous with the publicity surrounding Judge Cope's arrest in California, the local media was providing extensive coverage of an ongoing Judicial Qualifications Commission inquiry into alleged improprieties by Hillsborough Circuit Judge Robert Bonanno. Judge Bonanno had also been the subject of a criminal grand jury investigation which resulted in a publicized report that Bonanno should resign.

35. On September 20, 2001, the Tampa Tribune reported that the Judicial Qualifications Commission and Judge Bonanno had entered into an agreement disposing of the charges against Bonanno whereby Judge Bonanno issued an apology and was subject to a public reprimand. The referenced article pointed out that the JQC did not address Bonanno's long rumored affair with a courthouse employee. In this article the JQC was subject to public criticism by Special Prosecutor Jerry Hill who asserted that "the JQC probe was far too narrow and failed to take into account

the obvious and incredible loss of public confidence Bonanno had. I think they missed the mark."

36. In the meantime back in California, Judge Cope refused to acknowledge guilt to any of the two misdemeanor charges then pending. In retaliation the District Attorney's office in California filed additional charges in September 2001 alleging "battery," "aggravated trespass," and "theft" (of the hotel room key). These additional charges also received extensive publicity. Judge Cope was falsely portrayed in the media as a sexual predator who went so far as to attempt to batter down a hotel room door to get to his victim. As will be shown, the effect of this publicity had a profound effect on the manner in which the JQC conducted itself in relation to Judge Cope. The reporting had such an effect in substantial part because of widespread and vehement criticism of the JQC in connection with the Bonanno case as well as the Cope case, which criticism was mounted in the media and in the Florida House of Representatives.

37. On September 24, 2001, Tampa Tribune columnist Daniel Ruth blasted the JQC for giving Judge Bonanno a "slap on the wrist" - - "for essentially being a dope." Ruth wrote "Bonanno thought it was a pretty good deal to publicly admit he's a real creepy guy, as long as he gets to keep his seat on the taxpayer funded gravy train."

38. An editorial appearing in the September 24, 2001, Tampa Tribune indirectly criticized the Judicial Qualifications Commission for the Bonanno case and

reiterated the opinion that Bonanno was not fit to be a judge, contrary to the deal reached with the JQC.

39. An editorial appearing in the Tampa Tribune September 25, 2001, accepted all of the false publicity surrounding Judge Cope as true and asserted that things recently "got worse" for Judge Cope "with fury," reporting "a shocking allegation that he [Cope] tried to enter the women's hotel room without their permission." The editorial indirectly criticized the JQC for previously ignoring Judge Cope's problem in 1996 and asserted that Judge Cope "should promptly resign." The editorial having considered no evidence went on to impliedly threaten the JQC in connection with its evaluation of the Cope matter by asserting "if the JQC doesn't recommend his removal and the Supreme Court doesn't order it, the voters should see to it at the ballot box."

40. On September 27, 2001, the Tampa Tribune reported that the Florida Supreme Court was weighing the recommended disposition of the Bonanno case. That article prominently highlighted the desire of Special Prosecutor Jerry Hill to have the Supreme Court review the grand jury report he obtained for the purpose of rejecting the JQC recommendation. That grand jury report was cited in the article as containing a conclusion that Judge Bonanno had a lengthy extramarital affair with a courthouse clerk, being an asserted reason why he was not fit to be a judge.

41. As the storm of controversy swirled about the JQC in connection with its handling of the Bonanno matter, the Tampa Tribune reported on October 13, 2001,

that the Speaker of the House of the Florida House of Representatives, Tom Feeney, was seeking to open impeachment proceedings against both Judge Bonanno and Judge Cope. The implications of the announcement was clearly dissatisfaction with the manner in which the JQC was carrying out its responsibilities.

42. On October 19, 2001, columnist Daniel Ruth wrote in the Tampa Tribune an incredibly inflammatory article attacking Judges Bonanno and Cope as well as the JQC. Ruth characterized Cope as "Charles 'the Shadow' Cope;" and falsely asserted "Cope is facing several charges of peeping Tomism." Ruth opined "it's probably fair to say Judge Goo Goo Eyes (Cope) missed the seminar on privacy" and further asserted "despite conduct that ought to have anyone appearing in their courts blanching at the prospect of referring to these two bumpkins as 'Your Honor' Bonanno and Cope continue to cravenly hold on to office with all the dignity of Manual Noriega holed up in a rectory."

43. On October 20, 2001, the Tampa Tribune carried an article reporting that Special Prosecutor Jerry Hill had in recent weeks publicly criticized the Judicial Qualifications Commission for recommending only a reprimand for Hillsborough Circuit Judge Robert Bonanno. That article further reported that the Special Counsel for the JQC in the Bonanno case, Lori Waldman Ross, had asked the Supreme Court to unseal the grand jury transcripts for further evaluation of the case by the JQC. Ms. Ross was quoted "if Judge Bonanno in fact lied to the grand jury, there is no question that a public reprimand would be too lenient."

44. On October 20, 2001, the Tampa Tribune reported in an article captioned "West Coast Prosecutors Given No Quarter to Pasco-Pinellas Circuit Judge," that a California criminal investigator "has been nosing around Pinellas County this week." Unbeknownst to Judge Cope at the time, the California District Attorney's Office had sent an investigator to Pinellas County to dig up "dirt" on Judge Cope. Further, the investigator for the California prosecutor met with the St. Petersburg Times reporter covering the Cope story and offered to trade damaging information on Cope whereby the investigator proposed to release confidentially protected information under California law to the newspaper for publication.

45. On October 24, 2001, the Tampa Tribune reported statements of representative Larry Crow of the Florida House Judicial Oversight Committee stating "these judges (Bonanno and Cope) have clearly violated those standards and should step down." Crow went on to state "we are not on a witch hunt. There are severe problems with these judges." These statements were made and reported notwithstanding that Larry Crow had absolutely no information concerning the matter other than that which was reported in the newspapers.

46. The firestorm of media hysteria directed against Judge Cope continued to escalate.

47. In an editorial appearing October 25, 2001, in the Tampa Tribune, the writer asserted "what is absolutely clear is that Cope and Bonanno should be removed." Concerning Cope, the writer observed "these are serious charges against

anyone, but Cope's standing as a judge makes them horrendous and renders him completely ineffective to continue his job. And making matters worse is that this is his second arrest in six years . . . the main question is whether the actions of these two judges are impeachable. Cope's clearly are – if true. But even if a jury clears him, his overseers at the Florida Supreme Court are likely to retire him swiftly, as they should, because of his immoral behavior."

48. This remarkably unconstrained condemnation, without benefit of evidence, coupled with escalating attacks on the JQC itself, colored the subsequent actions of the JQC impermissibly in charging Cope as will be shown.

49. On October 26, 2001, the Tampa Tribune reported that the Supreme Court had unsealed the grand jury transcript regarding Judge Bonanno. The JQC investigator was quoted as saying "we can now reconsider." The Special Prosecutor who oversaw the grand jury was quoted as saying the unsealed transcripts will force the JQC "to do the right thing." The article was replete with criticism of the JQC for recommending only a reprimand for Bonanno.

50. An editorial appearing November 2, 2001, in the Tampa Tribune attacked what it characterized as "the super secret JQC" for the "fascinating" inconsistency of pushing to open the grand jury records of Bonanno while refusing to release records of its own investigative efforts. The following day, November 21, 2001, the Tampa Tribune reported that the JQC stood by its original decision that Bonanno should only be reprimanded. Notably that article asserted "the agency

(JQC) agreed the transcripts provide 'incontrovertible' evidence that Bonanno, 57, had an extramarital affair with a courthouse clerk: 'however this evidence reflects a private consensual affair, and no improprieties committed on court time or with court funds." Significantly, according to news accounts, this affair was long rumored in the courthouse and was the cause of scandal.

51. The attack on the JQC continued and in a November 28, 2001, article in the Tampa Tribune discussing the impeachment decision by the House of Representatives, Special Prosecutor Jerry Hill was quoted as stating that the JQC was "just short of worthless" for failing to accede to the grand jury's recommendation (that Bonanno be forced out of office). This attack on the JQC occurred only a week prior to the filing of charges against Judge Cope.

B. The Investigative Panel refused to consider exculpatory evidence which established the charges were not true and refused Judge Cope's request to investigate the matter.

3. On October 22, 2001, Judge Cope appeared before the Investigative Panel of the JQC through his counsel. At that time the Panel was provided with a copy of the polygraph examination of Judge Cope evidencing his truthful denial of all of the California charges. The polygraph report provided to the Panel was conducted by a nationally prominent former FBI official and Judge Cope's veracity was confirmed through a "blind review" of the test results by a second polygraph expert.

4. The Panel was provided a rendition of the underlying facts which established only that Judge Cope, as a consequence of previously undiagnosed

alcoholism and impaired judgment had committed a brief indiscretion with the Woman in the privacy of his hotel room.

5. The Investigative Panel asked Judge Cope's counsel if the charges in California were sufficient to establish probable cause for the JQC to charge Judge Cope. The panel was advised that, unlike the usual circumstances whereby formal criminal charges are predicated on sworn testimony, such was not the case in California. Further the panel was advised of conclusive evidence that the Woman lied to police; and that the said police reports were riddled with false and inconsistent statements. Finally, the panel was urgently requested to investigate the matter and put a stop to the public lynching of Judge Cope. The Panel requested Judge Cope's medical records.

6. The panel was provided with the records of Judge Cope's voluntary admission to an alcohol rehabilitation facility in South Florida for 30 days. Judge Cope also provided the records of private counseling he had undertaken following his return from California. These records were provided consensually by Judge Cope upon the representation to his counsel by General Counsel for the Investigative Panel, Thomas MacDonald, that the records would be considered in mitigation of any charges which might be filed. Judge Cope also voluntarily removed himself from the bench again at the suggestion and under the threat by Mr. MacDonald that if he did not do so he would be removed without pay. The foregoing representations were made

notwithstanding that the Investigative Panel had undertaken no investigation whatsoever into the underlying facts.

7. As a direct consequence of the above detailed publicity, false charges, inflammatory criticisms and demands for his removal from office, the JQC Investigative Panel on December 6, 2001, filed a formal notice of six charges against Judge Cope. These charges in substantial part mirrored the criminal charges which had been filed in California and widely reported in the press.[6] It has been indisputably established that the Investigative

[6] Counts II, III, and IV.

Committee conducted no meaningful investigation whatsoever in order to determine the propriety of those charges or whether probable cause in fact existed.

8. Despite not having conducted any investigation, Special Counsel for the JQC drafted each of the six charges in multiple paragraphs alleging facts which were in many particulars nowhere supported even in the police reports, and couched in such a fashion as to deliberately subject Judge Cope to further public ridicule and humiliation by virtue of their inflammatory character.

I. Special Counsel for the JQC and General Counsel for the JQC both admitted that no investigation was conducted; and the charges were filed in response to political pressure.

10. A week after the formal charges were filed, on December 13, 2001, counsel for Judge Cope engaged in an hour long telephone conference with Special Counsel John Mills of the JQC. In that conference Mills admitted that he had drafted the charges. He further admitted that the JQC had not investigated the underlying facts; and that he had drafted the charges "with the idea in mind that the women were total liars." In that conference Judge Cope through his counsel agreed to be deposed as early as January 18, 2002. Special Counsel Mills advised that following such deposition he would want to discuss settlement of the case; and if Judge Cope was telling the truth then he envisioned nothing more than a reprimand for the public intoxication (which Judge Cope admitted) and alcohol aftercare. He also admitted that

there was no requirement that Judge Cope report his arrest to the JQC and Judge Cope had no notice of such.[7]

11. Special Counsel was advised by Cope's counsel that Cope would fully cooperate with the JQC and had nothing to hide. Special Counsel was also advised of the consensual conduct between Cope and the Woman in his hotel room and the fact that Cope had observed intimate details of the Woman's apparel and physical anatomy which, if independently confirmed, would establish that Cope's rendition of the facts was truthful. Special Counsel in turn asserted that the JQC was not concerned about Cope's private conduct in the privacy of his hotel room; but was concerned about the allegations of the misconduct on the beach.

12. On March 27, 2002, the parties convened in Tom MacDonald's office. During that conference Mr. MacDonald made several admissions of impropriety. First in justifying the failure to investigate before filing charges, he stated that the Investigative Panel had "no choice" but to charge Judge Cope because he had been arrested. He further stated "we had to do something." As to the disparity between the JQC's treatment of Judge Cope on the charge of intimate conduct versus that of Judge Bonanno and every other judge in Florida, MacDonald's response was "times have changed."

13. Upon information and belief, supported by further circumstances outlined below, the JQC believed it could institute formal charges without investigation

[7] As charged in Count VI. JQC Executive Director Brooke Kennerly also admitted Judge Cope had no such duty in a St. Petersburg Times article published July 13, 2001.

or probable cause with impunity, because Judge Cope's criminal trial was then scheduled to take place in California in February 2002. As set forth below, Special Counsel for the JQC intended and sought to facilitate a conviction in California, which Special Counsel believed would compel Judge Cope's resignation and moot the JQC proceeding, thereby killing two birds with one stone: the JQC would look good in bringing the charges; and Judge Cope would be gone without the inconvenience of having to prove the charges.

14. In the referenced telephone conference on December 13, 2001, Special Counsel made reference to the forthcoming criminal trial and stated that he assumed Judge Cope would resign upon conviction.

O. Further conclusive evidence that no investigation was done prior to filing formal charges.

16. Had the most cursory investigation been performed by the JQC Investigative Panel, it would have been clearly determined that Judge Cope not only did not commit the alleged offenses in Counts I through V, he could not even reasonably be suspected of having committed same.

17. The evidence obtained through discovery efforts of Judge Cope's counsel after he was formally charged was readily available to the JQC prior to the charges being filed. The fact that such evidence so dramatically establishes the absence of any reasonable predicate for the charges, further corroborates the fact that no investigation was conducted.

18. The evidence obtained through discovery is more completely set forth in Respondent's accompanying Motion for Partial Summary Judgment, incorporated herein. That evidence will be very succinctly summarized here as to each count brought against Judge Cope by the JQC.

Count I – Public Intoxication

19. This count alleges that Judge Cope became intoxicated to such a degree on two successive nights in California that he "wandered" the streets, "eavesdropped" on a personal conversation, "interposed yourself into the women's personal conversation" and was "so intoxicated you could not remember what you did or where you went."

20. Both the mother and Woman testified at deposition that they were too drunk to even opine as to whether Judge Cope was drunk on the only evening they met him. The investigating police officer (Officer Nash) testified that while in his opinion Judge Cope was intoxicated on the first night he clearly knew where he was, where he was going and what he was doing. He was further coherent and cooperative. On the second night Officer Nash opined that Judge Cope was not even intoxicated and was likewise coherent, cooperative and fully aware of his surroundings.

21. The two women could offer no competent evidence whatsoever that Judge Cope either eavesdropped or interposed himself in their personal conversation; and made admissions that those "assumptions" were false.

Count II – Theft of Key

22. Both women testified at deposition that they never saw the key at any time in Judge Cope's possession. Further that the key was last seen on the balcony floor next to the seated Woman and that Judge Cope never got closer than two to four feet from that location and had remained standing at all times, and was never observed to bend down and pick up the key. The manager of the Normandy Inn testified that the mother reported that the Woman had lost her key the preceding day at the beach or while shopping before they ever met Judge Cope. Officer Nash testified that he developed no evidence that Judge Cope ever stole the key. All of these witnesses were immediately available to the JQC and the JQC accordingly could have very quickly determined there was no basis for this charge.

Count III - Inappropriate Conduct of an Intimate Nature

23. The Woman testified at deposition that the only thing Judge Cope did on the beach was attempt to kiss her a few times. She said he was "gentle" and merely leaned his face forward and she in turn merely turned away. The Woman denied any other personal contact or conduct with Judge Cope.[8]

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[8] While Count III does not expressly state, and is not the subject of this motion, and it was drafted before any evidence concerning it was voluntarily produced, the JQC now takes the position it encompasses conduct between Judge Cope and the Woman in the privacy of his hotel room, which conduct Special Counsel had initially advised was not within the jurisdiction or of any concern to the JQC. That issue is addressed in a separate motion to dismiss filed contemporaneously herewith. In many senses it is shameful that when libelous statements published in a privileged context without any investigation are totally unsupported by the alleged victim that the prosecutors would attempt to prosecute Judge Cope for what amounts to his clear candor and honesty. Judge Cope was aware of the fact the alleged victim had exculpated him on these charges when he testified. The only source for the evidence relating to him was the Judge himself, who because of his character candidly told all the truth. While anyone, let alone a judge, should always do this and therefore should not expect praise for merely doing his or her duty, it is nevertheless troubling that the prosecution takes his testimony which itself shows Judge Cope properly honored a request to stop from the Woman, ignores prior precedent on private conduct, and attempts to engraft on that testimony some false notion of predation. While Judge Cope and his family are indeed shamed by this momentary indiscretion which neither his heart nor body

Count IV – Prowling and Attempted Forcible Entry

24. While it is undisputed that the Woman claimed someone attempted to enter the women's hotel room on the second night, the evidence conclusively establishes that "someone" was not Judge Cope.

25. The Woman has all along insisted that the person attempting to enter the room used the room key. Since it is conclusively established that Judge Cope never possessed that key, Judge Cope is necessarily eliminated as even a suspect. Equally to the point however is the fact that the Woman testified at deposition that her only brief view of the person outside

the door was through a "blurry" peephole, that the person was standing on the far side of the balcony away from the door, and that all she saw were the outlines of a "round face and big ears" and she was unable to provide a description to Officer Nash other than "it was the man from last night." Notwithstanding, she claimed that "in my mind I knew it was Judge Cope." Such identification is insufficient as a matter of law to establish even probable cause.

26. This charge also alleges that Judge Cope "peered inside" the room and that he "used the key [he] had taken the night before to open the door." The charge further alleges that Judge Cope "attempted to break the door in forcibly."

27. There was no evidence to support these allegations whatsoever, which fact would have been readily determined had an investigation been done by the JQC. Nothing in the police reports suggested that the person outside the door peered into

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was committed to, it is simply wrong for a prosecutor to distort the shameful facts Judge Cope candidly admitted to justify a prosecution which never should have been brought.

the room. Consequently this charge is patently predicated solely on the fact that such a charge was filed in California. Officer Nash testified there was no evidence that the person peered into the room. The women testified that the room was pitch black and the person outside did not peer into the room. In fact peering into the room would have been impossible since there were no windows in either the door or the walls through which anyone could have looked.

28. Similarly there was no evidence in the police reports that the person attempted to break the door in forcibly. Had the JQC interviewed the investigating officer they would have determined that such was impossible without damage to the chain lock.

Count V – Making a Material False Statement to Police

29. The only basis for this count was the assumption by the JQC that Judge Cope was at a certain restaurant late that evening and that his statement to the police that he was returning from that restaurant to his hotel was a false alibi since the restaurant closed much earlier in the evening. However, had the JQC bothered to timely check their assumption against the facts (they later did), they would have quickly learned that Judge Cope had not been at that restaurant but in fact had been at another restaurant which was open late that evening. While Judge Cope described the restaurant to the police it was the police who suggested the name of the restaurant.

30. Had the JQC bothered to even talk to the police, they would have learned that the police were onsite within one minute and searched the environs where

Judge Cope would necessarily have been located had he been the person at the door[9] and he was not located.

Count VI – Failure to Disclose Arrest

31. The facts underlying this charge have never been disputed. Moreover, the JQC was aware before filing this charge that Judge Cope had reported all of the facts to his Chief Judge, Susan Schaeffer. Judge Schaeffer did not request that he step down, did not report the matter to the JQC and did not suggest the incident be reported to litigants appearing before Judge Cope on the basis that she (correctly) believed Judge Cope had committed no crimes. Judge Schaeffer was not charged with any misconduct. Moreover, when MacDonald advised Judge Cope's counsel Lou Kwall to notify the JQC that was done immediately in writing. Before this charge was filed, the Executive Director of the JQC, Brooke Kennerly, asserted that no judge had a duty to disclose an arrest to the JQC.

I. **The continuing prosecution of the charges against Judge Cope has been directed by General Counsel Thomas MacDonald. At his direction, Special Counsel sought: 1) to compel discovery and admissions from Judge Cope for the purpose of furnishing same to the California prosecutor to facilitate Judge Cope's conviction in California; 2) to protect and insulate Judge Cope's accusers from investigation and discovery of their perjury; and 3) to secure an oppressive and illegal order that Judge Cope submit to a "mental health evaluation" pursuant to sham investigation into Judge Cope's "fitness for office."**

32. On December 12, 2001, Special Counsel served requests to admit on Judge Cope which he caused to be publicly filed. Notwithstanding that the filing of such requests is not a "proceeding" under the rules of the JQC, Special Counsel

[9] Unless he had wings and could fly.

claimed that he was compelled to file such requests publicly because such constituted a "proceeding." On information and belief, this was done with the knowledge and expectation that the press would generate further adverse publicity to Judge Cope. It did.

33. An editorial appearing December 28, 2001, in the Tampa Tribune commented on the decision of Bonanno to resign and implicitly continued the criticism of the JQC for permitting Bonanno to hold on to office so long. The article asserted 'Bonanno never took responsibility for his actions. He never came clean with the public. Indeed throughout the entire affair he treated the public with disdain. He proved himself unworthy of the office he held. The justice system here is well rid of him." That comment is a scathing criticism of the JQC recommendation that he be permitted to remain in office.

34. On information and belief this increasing adverse publicity against the JQC in December and January caused Special Counsel at the direction of MacDonald to deliberately adopt tactics in the case against Judge Cope designed to prejudice his right to due process and to further subject him to ridicule in the media in the hopes that his resignation would be forced.

35. On January 4, 2002, the Tampa Tribune carried another editorial which in the most inflammatory language imaginable demanded Judge Cope's immediate resignation. The editorial noted "Charles Cope is up to his eyebrows in hot water. He is facing criminal charges in California, a Florida judicial disciplinary

hearing, and impeachment proceedings in the Florida House of Representatives - - yet Cope continues to fight for his job, further embarrassing himself, his family and more important, the judicial circuit that employs him."

36. Thus as of January 4, 2002, without a scintilla of evidence being presented in any forum in California or Florida and without even a token investigation by the JQC prior to filing its formal charges, Cope was publicly lynched – and attacked for having the audacity to attempt to stop the lynching. The editorial asserted "Cope is a classic example of an arrogant public office holder who fails to appreciate that his place on the bench was not created for him." It is clear that both Special Counsel and General Counsel at all times believed that the power and feared authority of the JQC, wielded throughout this process in a heavy handed and unconstitutional manner, coupled with the oppressive weight of political and public opinion, would crush Judge Cope and ultimately force his resignation; and at the very least shut the door to any meaningful exposition of the real facts. In a very real sense, the public scandal here was created, not by Judge Cope's arrest on a misdemeanor charge, but by the inflammatory nature of the baseless charges subsequently brought by the JQC and its thus far successful efforts to conceal the fact that the charges are false. As clearly demonstrated in this record, as detailed herein, nothing more nor less than a public and private mugging has been administered by the JQC, grateful that the media is now on its side in such a popular prosecution.

37. The above referenced editorial drew a parallel with Judge Bonanno (and the asserted cover-up by the JQC in that case) by stating "Cope needs to take a cue from Hillsborough County Circuit Judge Robert Bonanno who announced his resignation last week - - Cope needs to come to his senses and resign immediately. He has hurt the Pasco-Pinellas judiciary and the public's confidence enough."

38. The first step in concealing the falsity of the charges, of which fact the JQC was on clear notice as early as October 22, 2001, was to protect the accuser. Thus Special Counsel refused and failed to comply with Judicial Qualifications Commission Rule 12(b). At the time of filing his response to Judge Cope's 12(b) demand on December 13, 2001, Special Counsel knew that Judge Cope had access only to a redacted police report and believed that Judge Cope and Judge Cope's counsel did not know the identity or whereabouts of the complaining witness. Special Counsel also knew Judge Cope passed a polygraph. Special Counsel intended, as evidenced by the insufficient response he filed, attached as Exhibit 1, to conceal this information from Judge Cope's counsel as long as possible prior to Judge Cope's then scheduled criminal trial in California in February 2002. When Judge Cope's counsel complained of the inadequate response, Special Counsel claimed on December 20, 2001, that he did not know where the witness was located and asserted that the California prosecutor had refused to disclose her whereabouts. Special Counsel was advised that the name and whereabouts of the witness was known and would be furnished to him promptly. He declined this offer stating he was certain she could be

located. The circumstances warrant the conclusion that Special Counsel knew at all times where the witness was located and deliberately withheld that information in deliberate violation of Rule 12(b).[10]

39. Rule 12(b) requires the Special Counsel to "promptly furnish - - the names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing…" [emphasis added]. Examination of the initial response to Judge Cope's Rule 12(b) demand establishes conclusively the mendacity and improper purpose of the response. Special Counsel asserted therein:

> "Special Counsel has not determined which witnesses to offer at the hearing and will not be able to do so until some further discovery is taken; however Special Counsel will promptly forward all information governed by Rule 12(b) to the Respondent as soon the witnesses are determined."

40. The above representation all too cleverly sought to avoid the mandate of the rule by employing the term "determined" versus "expects" and in any event could not possibly have been truthfully made.[11] Special Counsel was quite aware that the only witnesses who could establish the charges already brought were the mother and the Woman (apart from Count VI) therefore he could not have possibly concluded that those witnesses were somehow unnecessary to his case or unknown to him. Nor could he have possibly believed that he had to take further discovery before arriving

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[10] Further evidence of this conclusion is the fact that JQC investigator Robert Butler interviewed the mother telephonically at her Maryland home on October 22, 2001. The only question he asked her was if they ever located the room key. Obviously if the JQC knew where the mother lived, it had to know where her daughter lived. Conversely, if her address was unknown (she lived near the mother) it is expected the investigator would have asked the mother where the daughter lived. He did not.

[11] In his cover letter accompanying the response, Special Counsel stated "I'm not trying to be cute with this response."

at any "expectation" that he would call them as witnesses. The dishonesty and bad faith of this response is further conclusively evidenced by his contention that the demand previously forwarded by Judge Cope's counsel was "beyond the scope of Rule 12(b) - - and overly broad." In fact, the Respondent's demand expressly tracked the rule. The only logical inference that may be drawn from this non-responsive and fictitious "response" is that Special Counsel was endeavoring to prevent Respondent's discovery access to the two principal witnesses for as long as possible, as subsequent events conclusively demonstrated.

41. Special Counsel never bothered to formally identify the witnesses until after counsel for the Respondent told him on December 20, 2001, that the Respondent was aware of the their identities and locations and was going to schedule their depositions for January 22 and 23, 2002. Because of Judge Cope's impending criminal trial in California in February and because Judge Cope was to be deposed on January 18, 2002, counsel for Judge Cope was

aware, as was Special Counsel, that there was a limited window prior to that trial before Judge Cope's counsel could take the women's depositions. It is reasonable to conclude that Special Counsel sought to not only narrow that window but to shut it so that the California prosecutor could have the benefit of Special Counsel's deposition of Judge Cope before the criminal trial to prepare her witnesses (the two Maryland women) for that trial and Judge Cope would not have the benefit of the reciprocal discovery. The evidence that Special Counsel was colluding with the prosecutor to this end is overwhelming as discussed below. On December 21, 2001, counsel for Judge Cope forwarded to

John Beranek notices and subpoenas for deposition of the Maryland witnesses which were thereafter properly served.

42. Despite knowing of the noticed depositions, "their time and place" and having agreed to same, Special Counsel drafted a letter on December 22, 2001, which was in all salient respects a sham. In that letter he claimed to have just located the witnesses and proposed to conduct his own deposition of Lisa and Nina Jeanes at the same time and place that Judge Cope had noticed their discovery deposition and use such videotape deposition in lieu of live testimony at trial. The correspondence also purported to recite a non-existent agreement that Judge Cope's deposition would precede that of the Woman. On December 27, 2001, in a telephone conference with Special Counsel, Judge Cope's counsel objected that this proposal concerning a crossed noticed video deposition was patently unfair and would essentially require Judge Cope to cross-examine JQC witnesses for the purposes of trial without obtaining discovery, effectively depriving Judge Cope of his Sixth Amendment right of confrontation, Special Counsel responded that it was "unfair" to require Lisa Jeanes to appear before the JQC because "they're making her travel to California for the criminal trial." Judge Cope's counsel pointed out the unfairness to Judge Cope in the procedures he proposed and Special Counsel responded "I'm not concerned about fairness to Judge Cope. My job is to convict Judge Cope."[12]

[12] This statement alone is a damning admission and strongly corroborates the basis for the selective and vindictive prosecution claims advanced here. Significantly, in an affidavit in response to this fact, Special Counsel did not deny it.

43. In a later affidavit addressing this comment, filed with the Court, Special Counsel significantly did not deny making the statement. His plainly equivocal rebuttal was, "I do not believe that Mr. Merkle is correctly quoting me, but I do not have a transcript of the telephone conversation." He went on to make a direct admission as to the selective and vindictive conduct that is now occurring in this case. He stated:

> "I explained to Mr. Merkle during that conversation and others, that my only job is to prove the allegations in the notice of formal proceedings. Each time, I have clarified that if I ever had reason to doubt any of the allegations, I would not attempt to prove them and would seek dismissal of any unsupported charge. I know that just because there is probable cause to believe that a judge engaged in misconduct (which is the standard for filing charges) does not always mean that the Special Counsel will find clear and convincing evidence to prove that the judge did so (which is the standard for proving the charges)."

44. In that statement filed under oath, Special Counsel clearly acknowledged his responsibility and stated intention to dismiss any charge then pending against Judge Cope which could not be proven by clear and convincing evidence. In that event, Special Counsel stated, under oath:

> ". . . I would not attempt to prove them and would seek dismissal . . ."

45. Since Special Counsel and General Counsel have expressly acknowledged subsequent to that affidavit, that they could not prove Counts II, IV and V and most of the allegations in Count I, and have not only refused to dismiss them now but have threatened to penalize Judge Cope for even defending against the

charges at trial, such could not be clearer evidence of the vindictive and selective nature of this prosecution and Special Counsel's mendacity.

46. Further evidence of the impropriety of this continued prosecution appears in the transcript of the deposition of Lisa Jeanes, the JQC's principal witness, taken May 7, 2002. Prior to that deposition Special Counsel had been provided the affidavit of the witness' former boyfriend confirming the intimate details that Judge Cope had observed in the hotel room. Special Counsel had also been provided the substance of the report of another former married boyfriend, Dr. Stephen Hance, who engaged in an extramarital affair with the witness from approximately 1997 through September 2000. Special Counsel was told prior to the deposition of the witness that Stephen Hance had reported not only such affair but the fact that the witness believed she was pregnant in the summer of 2000, having missed periods, and thereafter flew to Maryland to see a gynecologist; and upon return reported that he did not have to worry anymore because she had had her period. Stephen Hance also confirmed that the witness always shaved her pubic area, which was the detail observed by Judge Cope; and further corroborated not only Judge Cope's veracity but the witness' mendacity in denying such at her earlier deposition.

47. In the referenced deposition the witness was asked to identify Dr. Hance and her response was "he's an old guy I used to date - - briefly - - when I was

in Cal - - in Kentucky."[13] She falsely testified the relationship stopped there. Other pertinent questions

[13] Dr. Hance is only seven years older than the 32 year old woman.

regarding her admissions to Dr. Hance which bore directly on the issues in this case were met with a refusal to answer upon the instructions of her private counsel.[14] In response to the continued refusal to answer questions, and her lawyer's contention that the questions were irrelevant, Judge Cope's counsel made a proffer on the record appearing at page 262:

> "Counsel for the record, your client told my client that she had a recent abortion. She told a police officer she had a recent abortion. She told the deputy district attorney investigator she had a recent abortion. We have information that Dr. Hance had advised us that she told him she thought she was pregnant in the summer of 2000. He took her to see Dr. Wright and then she flew back to Maryland to see her gynecologist."

48. In response to that proffer Mr. Mills stated: "Mr. Merkle is lying" (deposition transcript at 263). At the conclusion of the deposition Mr. Mills was asked to place on the record the evidence he had justifying his accusation that Judge Cope's counsel was lying. He declined. In fact this conduct by Mr. Mills was a continuation of the dishonesty and mendacity that he has exhibited throughout this case including the filing of a false affidavit with the Court and attacking the character of Judge Cope's counsel for untruthfulness.

49. The extent to which Special Counsel has gone to defend the credibility of a totally uncredible witness is perhaps no better illustrated that in the colloquy at her most recent deposition. She had testified in her first deposition that she had been raped by two or three individuals at one time. Inquiry into that matter was permitted because the JQC had charged Judge Cope with taking advantage of this woman who

[14] Notably, Special Counsel already admitted his responsibility for suggesting that the witnesses obtain private counsel.

was supposedly in an "emotionally vulnerable state." She denied that that multiple rape occasioned any

psychological difficulties or required any counseling, raising a significant question as to whether the multiple rape ever occurred. The subject accordingly was revisited in her most recent deposition. In her deposition she denied that she was drunk (contrary to what she had reported earlier to Dr. Hance). She admitted that when the supposed rapes occurred she was "unconscious." When asked if she drank herself into a state of unconsciousness she stated "I went to sleep." She admitted never seeking medical attention or reporting the supposed rape to police or anyone in charge at the riding academy where this supposed rape occurred.[15]

50. On Tuesday, January 8, 2002, Judge Cope's counsel expressed concern to Special Counsel that he was improperly working with California authorities. Special Counsel stated it was his position that the California prosecutors were free to appear and attend the depositions of Judge Cope and the Maryland witnesses. He further volunteered that the California prosecutor was aware of the scheduled deposition of the Maryland witnesses and so far as he knew had no reason or interest in appearing at the deposition, confirming his continuing dialogue with the California prosecutor. He also stated that as far as he was concerned, anyone, including the prosecutor and the media, could attend the deposition or order transcripts as a public record.

51. On January 16, 2002, in the presence of three witnesses in the undersigned's conference room, the undersigned engaged in a telephone conference

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[15] At her first deposition, testifying in support of her consistent and adamant claim that she was awakened by the insertion of the room key into the door, she stated she was a "light sleeper." We must presume then having slept through two or three rapes that she was not in fact a "light sleeper" and the key made a thundering noise when inserted into the lock.

with Special Counsel. A specific subject of the conference was the concern of the undersigned and Judge Cope that

Special Counsel intended to cause the publication of the Respondent's deposition in the press and/or to reveal its contents to the California prosecutor in order to assist in the preparation of the state's witnesses both for the criminal trial and for their depositions. In that conference Special Counsel was specifically requested to agree to forbear from filing or sharing a transcript of the Respondent's deposition with California authorities or the Maryland witnesses; and in the absence of such agreement Special Counsel was advised a protective order would be sought. Special Counsel advised that such a motion was unnecessary and specifically agreed he would not share the contents of the Respondent's deposition with either the California authorities or the witnesses to be subsequently deposed in Maryland. Moreover, he ensured that he would not request a formal transcript or file same in the record prior to a week preceding final hearing in this case which he asserted would not occur until after the scheduled California trial. Based on those assurances Judge Cope's counsel did not file a motion for protective order. In reaching this "agreement," Special Counsel concealed the fact, later discovered, that he had already told the California prosecutor the date and time of Judge Cope's deposition and had suggested she order an immediate transcript as a "public record."

52. From December 21st forward Special Counsel for the JQC on information and belief, at the direction of MacDonald, General Counsel, undertook efforts to deprive Judge Cope of his right to due process in the pending proceeding by, *inter alia*:

a. Entering into a collusive and hidden agreement with the California prosecutor to provide her a copy of Judge Cope's deposition prior to the criminal trial while arranging for the obstruction of the "victims' depositions prior to trial. This course of conduct

was intended to circumvent California Rules of Procedure (which do not permit discovery depositions) for the benefit of the California prosecutor while at the same time preventing reciprocal pre-trial discovery depositions of the prosecutor's main witnesses.

b. Falsely reporting to the two female witnesses prior to their scheduled deposition that Judge Cope's counsel had threatened to "terrorize" them in their depositions;

c. Encouraging the two witnesses to obtain private counsel to prevent such alleged effort to "terrorize" them.

d. Filing a false affidavit with the Hearing Panel suggesting that Judge Cope did not attend his scheduled deposition on the basis of a pretextual hospital admission occasioned by fear of some reported inconsistency between what Judge Schaeffer had reported to the panel and what Judge Cope's counsel had reported;

e. Falsely asserting to the Hearing Panel that anticipated deposition questions pertaining to the mother's alcoholism and abuse of the Woman and the Woman's recent abortion were improper, irrelevant and related to propositions which were false. [16]

53. In fact, as Special Counsel well knew the 32 year old woman had solicited Judge Cope's company and confided in him that she had a married boyfriend, had undergone a recent abortion, and upon report of these matters to her mother, who she said was an abusive alcoholic, the mother was verbally abusing her. Special Counsel further well knew that he had drafted the false charge that Judge Cope had

[16] It is believed this false representation was intended to set the stage for the witness' Maryland lawyers to later obstruct legitimate inquiry and to protect the exposure of the woman's expected perjury at the deposition.

eavesdropped on the women's conversation and had contended on behalf of the JQC that the Woman had not confided in Judge Cope these matters and further contended that Judge Cope made unwanted advances against the Woman on the beach in California. Special Counsel further well knew that Judge Cope had reported that the Woman made advances toward him, that she confided the matters which were to be the subject of the deposition to Judge Cope, and that such facts were directly material to the Woman's veracity and credibility in making the underlying allegations in California and by extension the identical charges filed by the JQC. Special Counsel was further well aware that the Woman had recanted her initial allegations against Judge Cope of "forceful sexual advances" and knew or should have known that she had lied in other particulars.

54. The first step in this process was the deliberate and improper interference in Judge Cope's fundamental rights to discovery. Specifically, the 32 year old woman and her mother were scheduled for deposition shortly after Judge Cope's scheduled deposition. This fact was announced to Special Counsel on or about December 20, 2001. As noted, Special Counsel had entered into an undisclosed agreement with the California prosecutor to immediately share with her the deposition of Judge Cope for use and assistance in convicting Judge Cope in California.

55. On the evening before Judge Cope's scheduled deposition on January 18, 2001, Judge Cope was admitted to a hospital on an emergency basis for a surgical procedure. When Special Counsel was advised of this fact Special Counsel filed an

emergency motion for a protective order seeking to prevent the deposition of the two women in Maryland on the asserted ground that it would compromise the case against Judge Cope in California. Judge Cope through his counsel filed a response to that motion; and Special Counsel filed a reply which shockingly revealed in an affidavit of Special Counsel that he had falsely advised the two Maryland witnesses that Judge Cope's counsel had "threatened to terrorize them" at their depositions and further threatened to ask irrelevant questions to establish propositions that were untrue. As Special Counsel well knew no such threat had been made and the questions which had been discussed in advance with Special Counsel were directly relevant to the issues in the JQC proceeding. Special Counsel further shockingly revealed that he had advised the two Maryland witnesses to obtain private counsel to protect them from Judge Cope's counsel. This admitted scenario presented the prospect that Special Counsel had all along intended that Judge Cope be deposed first, that his deposition would be provided to the California prosecutor, and that the Maryland witnesses (Judge Cope's accusers in California) would then refuse to be deposed or answer pertinent questions prior to the California trial.[17] This arrangement would have provided an inappropriate advantage to the California prosecution. Not coincidentally, Special Counsel had previously made the off handed remark on December 13, 2001, that he assumed, of course, Judge Cope would resign if convicted in California.

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[17] This scenario has in fact played out. At the Woman's deposition on March 1 and May 7, she repeatedly refused to answer relevant questions on instruction of her private counsel. At no time on the record did Special Counsel advise the witness, as he well knew, that the questions were relevant and should be answered.

56. Special Counsel further frivolously alleged that permitting the depositions of the "victims" to go forward would prejudice the criminal trial in California. Special Counsel frivolously (and incoherently) asserted that permitting the Respondent his due process right to depose the witnesses in this proceeding would "have the effect of interfering with the State of California's paramount interest in enforcing its criminal laws." The gravity of Special Counsel's misconduct is more particularly set forth in Judge Cope's "Response to Special Counsel's Emergency Motion for Protective Order," with attached exhibits (Exhibit 2).

57. It is noteworthy that contemporaneous with Special Counsel's motion, the California prosecutor also filed a pleading in the JQC proceedings alleging falsely that Judge Cope had "breached" an agreement to be deposed; and the private counsel for the women in Maryland also filed correspondence with the Court attached as Exhibit 3. In that correspondence Attorney Paul Kemp on behalf of the principal witness also falsely asserted a breach by Judge Cope and claimed that the Woman had not been properly served and would not appear for her deposition. It is clear from the content and contemporaneousness of these filings that Special Counsel, the California prosecutor, and the Maryland lawyers had discussed and were prepared to ambush Judge Cope's counsel at the women's deposition (presumably after Judge Cope had already been deposed) with delaying tactics frustrating and preventing the Woman's

deposition and requiring the filing of a motion to compel and further delaying the deposition.[18]

58. A hearing was held on the motion on January 21, 2002, and the Court, *sua sponte,* terminated all discovery pending the completion of the criminal trial.

III. After Special Counsel learned that Judge Cope's criminal trial had been postponed, he pursued further oppressive and unconstitutional tactics to harass and intimidate the Respondent and compel his resignation.

A. *Special Counsel attempted to obtain irrelevant and private medical records of Respondent and made false representations to the Court in furtherance of that objective.*

59. Prior to the January 21, 2002, hearing, Special Counsel queried Judge Cope's counsel on a report he stated he had received from California that Judge Cope had been hospitalized on a suicide watch. He refused to divulge the source of this report.[19] Special Counsel was advised that such a report was outlandishly false. He was further advised that Judge Cope was undergoing weekly care and therapy from a psychiatrist who was nationally renowned for alcoholic aftercare and that Judge Cope suffered no suicidal ideations at all and in fact, had vacationed with his family in Colorado in the last week of December and first week of January.

60. On December 11, 2001, Special Counsel filed a Request for Production. Request numbered 9 demanded all records, "that relate to any

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[18] In the pleadings filed by Special Counsel he suggested that Judge Cope's hospitalization was pretextual and based upon Judge Cope's supposed fear of inconsistencies with his reported testimony and facts as reported by Susan Schaeffer. The Honorable Susan Schaeffer was read the affidavit of Special Counsel making such allegations and she advised Judge Cope's counsel that such allegations were false.

[19] Later determined to have been the California prosecutor.

consultation, diagnosis, or treatment relating to your actual use or abuse of alcohol or drugs or allegations of such use or abuse at any time in your life."

61. Following the January 21st hearing on Special Counsel's motion for protective order to prevent his witnesses' depositions, Special Counsel engaged in a three-way telephone conference with Judge Cope's two co-counsel (Robert Merkle and Louis Kwall) on Wednesday, January 23, 2002, for the purpose of resolving outstanding discovery issues. Discussion was held at that time concerning the medical records that Special Counsel was seeking from Judge Cope. Special Counsel admitted that such records were not relevant to the pending charges; and proposed that Judge Cope produce those records voluntarily under the pretext of a new investigation by the Investigative Panel of the JQC into the Respondent's "fitness for office." When counsel for Judge Cope objected to this suggestion

on the basis that there was no justification for such an investigation and reminded Special Counsel of the previously reported good physical and mental health of Judge Cope, Special Counsel asserted that Judge Cope "may not have a choice."

62. On the following day, January 24, 2002, Special Counsel faxed to Louis Kwall a letter under this case number (01-244), which confirmed in paragraphs 2 and 3 thereof his admission that the medical records he sought were not relevant to this proceeding. (Exhibit 4.)

63. On January 25, 2002, a second three-way telephone conference was held with Special Counsel involving the undersigned and co-counsel Louis Kwall. Once again Special Counsel sought Judge Cope's voluntary acquiescence and voluntary production of the medical records under the umbrella of a proposed second investigation into Judge Cope's "fitness for office" Special Counsel's suggestion was couched within the context of maintaining the confidentiality of such records.

64. At no time during the referenced telephone conferences of Wednesday, January 23rd and Friday, January 25th did Special Counsel advise that a second investigation had in fact been opened by the investigative panel of the JQC. Nor had Judge Cope received a Rule 6(b) notice of such investigation.

65. Thereafter on January 25, 2002, Special Counsel faxed another letter to Mr. Kwall which for the first time referenced "Case No. 02-15," the case number of the "new" investigation into the Respondent's supposed fitness for office. In that letter, attached as Exhibit 5, Special Counsel further corroborated his admission that

the medical records he sought were irrelevant in this proceeding and that he proposed that Judge Cope submit to a proffer under oath within the context of the "new" investigation. For reasons unexplained, and on information and belief upon the instruction of Thomas MacDonald, Special Counsel immediately thereafter withdrew that proposal. (Exhibit 6.)

66. On Monday, January 27, 2002, the undersigned received a notice pursuant to Rule 6(b) of a formal investigation by the JQC into Judge Cope's fitness to serve as a Circuit Judge. In that letter, dated January 25, 2002, attached as Exhibit 5, Special Counsel asserted "I am investigating: (1) chemical dependency, (2) physical health, and (3) psychological health including possible suicidal tendencies." This investigation on information and belief was opened pursuant to the misconduct of Special Counsel in disregarding advice from Respondent's counsel concerning the issue, withholding such advice from the investigative panel, and conveying to the investigative panel spurious and malicious rumors and reports which he knew or should have known were untrue.

67. Significantly, in this 6(b) letter (attached as Exhibit 5), Special Counsel sought the voluntary production of medical records for the past two years.[20] In addition, Special Counsel also sought the voluntary submission by Judge Cope to questions which he conceded were not relevant to the proceedings in this case.

[20] As compared with the requested production of records over his entire lifetime in this case.

68. Special Counsel requested that the records be provided in advance of the Investigative Panel's then scheduled meeting of February 8, 2002, asserting that he "would like to be able to report at least some preliminary findings by that time."

69. When Judge Cope refused to provide such records, Special Counsel resorted to a sham Motion to Compel Production in this case filed February 20, 2002, notwithstanding his numerous admissions that such records were irrelevant and inadmissible in this case.

Judge Cope filed a motion for protective order, attached as Exhibit 7 with exhibits, which set forth further disturbing misconduct of Special Counsel which he had sought to conceal from Respondent, as set forth below.

B. *Special Counsel caused a sham investigation to be opened by the JQC Investigative Panel for the purpose of further oppressing and intimidating Judge Cope to force him to resign.*

3. As noted, Judge Cope's counsel received correspondence January 27, 2002, from Special Counsel carrying a new case number and advising that the Investigative Panel as investigating Judge Cope's chemical dependency, physical health, and psychological health including possible suicidal tendencies.[21]

4. As further previously noted, prior to January 20, 2002, Special Counsel advised the undersigned that he had received a report "from California" that Judge Cope had been hospitalized on a "suicide watch."[22] Special Counsel was advised that such a report was baseless. Special Counsel was further advised that Judge Cope had received a clean bill of physical and psychological health from both Hanley-Hazelden (which records were in Special Counsel's possession), and from psychiatrist Dr. Walter Afield, a prominent physician/psychiatrist, nationally renowned for his experience and expertise in alcoholic aftercare; that Judge Cope was alcohol free and attending AA sessions; and that Judge Cope's physician (Dr. Walter Afield)

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[21] Prior to receipt of that notice, Special Counsel advised that he believed Judge Cope's hospitalization on January 18, 2002, was pretextual. Therefore that could not have been the basis to question Judge Cope's physical fitness for office (and it was not).

[22] Although Special Counsel refused to identify the source of this report it was later determined the false report came from the California prosecutor.

reported Judge Cope was in excellent physical health and at no time suffered any suicidal ideation or "suicidal tendencies." Further, Special Counsel had been provided the name and address of that physician as a witness that Special Counsel was free to depose. Special Counsel was also later provided an affidavit from Judge Cope's primary care physician, Dr. Stanley Moles attesting to Judge Cope's physical health. Dr. Moles' affidavit is attached as Exhibit 8.

5. It clearly appears, from evidence now available to Judge Cope that Special Counsel unilaterally initiated a sham new investigation, without the knowledge or consent of the Investigative Panel. Alternatively, the Investigative Panel was persuaded to open a new investigation upon the submission of information by Special Counsel which he knew or reasonably should have known was false.

6. Despite prior advice that the California report was false and Judge Cope had never been hospitalized on "suicide watch," on February 12, 2002, Special Counsel sent a letter with a proposed affidavit to Judge Cope's former counsel in California, Thomas Worthington. A copy of that letter and affidavit is attached as Exhibit 9. In that letter Special Counsel admitted his prior telephonic contact with Respondent's lawyer, which was without advice to or permission from Respondent or present counsel. Special Counsel's letter included an affidavit for Mr. Worthington to sign which contained allegations which Special Counsel knew or should have known were false. The affidavit resurrected the false allegation that Judge Cope was hospitalized on a "suicide watch" on or about September 13, 2001.

7. In fact as Special Counsel well knew Judge Cope had not been hospitalized on September 13th for any reason. Special Counsel also knew prior to submitting such false affidavit that Mr. Worthington had advised him that he had no recollection of being told that Judge Cope was ever hospitalized on "suicide watch." The purported context of Special Counsel's allegation concerning the hospitalization on "suicide watch" was the supposed reason advanced by Mr. Worthington for a continuation of a pre-trial conference in California. The pre-trial conference was scheduled for September 6, 2001. The records of Hanley-Hazelden provided to Special Counsel months before contained the letter of August 30, 2001 to co-counsel Louis Kwall from Hanley-Hazelden setting forth the reason for the requested continuance. Such letter is attached as Exhibit 10. The letter does not assert, or even intimate a hospitalization on "suicide watch." Knowing all of this, Special Counsel submitted a false affidavit for Mr. Worthington's signature under threat of a subpoena for deposition.

8. When Judge Cope's counsel learned of this course of conduct after the fact (from Judge Cope's California lawyer) correspondence was sent to Special Counsel again reiterating the allegation was baseless.

9. Notwithstanding having been clearly advised that the allegation he was making was utterly false and having been rebuked by the Court for his improper efforts to compel irrelevant medical records,[23] Special Counsel apparently reported such false

[23] Special Counsel's motion to compel was denied.

information to Judge Wolf and the Investigative Panel, resulting in the issuance by Judge Wolf of an "Order to Submit to Mental Evaluation" on March 13, 2002. That order is attached as Exhibit 11. Significantly, the order sought a determination of "chemical dependency." This order was unlawfully issued in spite of the fact that the same Investigative Panel had months before been provided the records of Judge Cope's inpatient treatment for 30 days at an alcohol rehabilitation facility. It was further entered notwithstanding the advice to Special Counsel that Judge Cope was regularly attending AA

meetings and regularly receiving professional counseling from a nationally recognized and highly qualified physician with respect to alcohol aftercare and Judge Cope was now alcohol free. Moreover, Rule 13 (Disability) of the Rules of the Judicial Qualifications Commission permits the Investigative Panel to order a mental examination only upon receipt of information that the judge suffers a "mental disability which seriously interferes with the performance of the judge's duties." Most incredibly, the Order was entered **only weeks after Special Counsel was furnished the affidavit of Dr. Walter Afield asserting unequivocally that Judge Cope suffered no physical, mental, or psychological disability whatsoever which could interfere with his duties as a judge. That affidavit is attached as Exhibit 12**. Since no such information existed and the facts presented to Special Counsel were clearly to the contrary, the Order was patently illegal and an abuse of process.[24]

IV. Both Special Counsel, John Mills, and General Counsel, Thomas MacDonald, admitted they possessed insufficient evidence to sustain conviction of Judge Cope on Counts II (Theft of Key), IV (Prowling and Attempted Forcible Entry), V (Making a Material False Statement to the Police) and allegations contained in paragraphs 1 through 8 of Count I (Public Intoxication). Upon subsequent instruction by Judge Wolf of the Investigative Panel, Judge Cope was advised that unless he plead guilty to Count III (Inappropriate Conduct of an Intimate Nature) he would be prosecuted on all of the charges including those for which insufficient evidence existed. Furthermore, Judge Cope was threatened that if he went to trial on the charges he would be removed from office.

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[24] Further evidence of General Counsel's role in directing this oppressive course of conduct was his statement to Judge Cope's counsel that any resolution of the case would require Judge Cope to waive medical record confidentiality, enroll in a treatment program at the same facility identified in Judge Wolf's order, and, in MacDonald's words, "pee in a cup" as long as Judge Cope remained a judge. That facility, on referrals from the JQC in the circumstances here, required that Judge Cope waive medical records confidentiality and provide same to the JQC. Quite clearly this order was entirely pretextual and specifically intended to obtain the same medical records that Special Counsel had twice tried to get and failed.

10. While the above events were transpiring, discovery proceeded in the case at great expense to Judge Cope and notwithstanding the efforts to obstruct such by Special

Counsel. Depositions were taken of the mother and daughter in Maryland and of material witnesses in California, including the investigating police officers, the manager of the Normandy Inn and the investigator for the California District Attorneys Office. In addition, interviews were conducted by investigators for Judge Cope of two former married boyfriends of the alleged victim. One of the boyfriends executed an affidavit which was provided to Special Counsel. In that affidavit he recounted that he was a student of the "victim" at the University of California in Davis. His affair lasted until approximately a month after Judge Cope encountered the two women in California. This witness independently confirmed the physical anomaly observed by Judge Cope in the privacy of his hotel room. A copy of his affidavit is attached as Exhibit 13. He further advised that while the "victim" was in Monterey meeting with Judge Cope, he had returned to his home state to reconcile with his wife. The alleged "victim" telephoned his wife and cruelly taunted her on the telephone.[25] He further confirmed that the mother was alcoholic which both the mother and daughter falsely denied at their deposition

[25] The wife's affidavit is attached as Exhibit 14.

(which Special Counsel also denied in his affidavit filed with the Court in seeking to obstruct and prevent discovery of such facts).

11. The second married boyfriend, advised investigators for Judge Cope that he carried on an intimate relationship with the woman from approximately 1997 through September 2000 (affidavit of Lindsey Colton is attached as Exhibit 15). He further confirmed that the daughter's mother was an abusive alcoholic and got very mean to the daughter when drunk. He further confirmed that he and the daughter discussed marriage, a condition of which was that she join Al-Anon because of the alcoholic history in her family

(mother, father and brother were all alcoholics) and her mother's abuse. Finally, he confirmed that in the summer of 2000 the "victim" reported to him that she thought she was pregnant and had missed periods. In response he took her to another doctor in California and she thereafter flew back to Maryland to see a gynecologist. Upon her return she told him that he did not have to worry about her being pregnant anymore. At deposition the daughter falsely denied this relationship except for a brief relationship in 1997[26] before she moved to California and falsely denied traveling to Maryland.

12. Special Counsel requested to depose Judge Cope's healthcare provider, Dr. Walter Afield. Upon arrival at Dr. Afield's office on March 22, 2002, Special Counsel announced that he did not wish to depose Dr. Afield but rather wished to interview him under oath, which Special Counsel himself administered.[27] Over the course of approximately one hour, Dr. Afield answered all questions put by Special Counsel. He advised that he had been treating Judge Cope since December 2001, that Judge Cope was alcohol free; that Judge Cope manifested no suicidal ideations whatsoever; that Judge Cope was attending AA sessions; and that Judge Cope's continued therapy and recovery was being monitored on a weekly basis and would include family counseling.

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[26] Falsely testifying under oath that he was some "old guy" she "dated briefly" in Kentucky.

[27] With dubious authority.

13. Immediately thereafter Special Counsel traveled to the offices of Louis Kwall to complete the deposition of Judge Cope. General Counsel, Thomas MacDonald attended

that deposition. Upon the conclusion of Judge Cope's deposition, Special Counsel for the JQC and General Counsel for the JQC both volunteered that they had concluded there was insufficient evidence to prosecute Judge Cope further on Counts II, IV and V of the pending complaint. They further acknowledged that the aggravating circumstances contained in paragraphs 1 through 8 of Count I were likewise unsupported by the evidence. At that time in the presence of both counsel for Judge Cope and the Respondent himself, Special Counsel apologized to Judge Cope for questioning his veracity and assured Judge Cope and his counsel that the charges would be dismissed. General Counsel Thomas MacDonald asserted that notwithstanding the lack of proof, Judge Wolf was still pressuring them to continue to prosecute Judge Cope for the alleged conduct at the Woman's hotel room door. Mr. MacDonald stated he would have to convince Judge Wolf that such was inappropriate.

FURTHER ADMISSIONS BY SPECIAL COUNSEL
THAT COUNTS II, III, IV, V AND THE MAJORITY OF COUNT I
COULD NOT BE SUSTAINED BY THE EVIDENCE;
AND ADMISSION THAT JUDGE COPE WAS TELLING THE TRUTH

14. After admitting on March 22, 2002, that the JQC could not prove Counts II, IV and V and the majority of the allegations in Count I as noted, Special Counsel apologized to Judge Cope for doubting his veracity.

15. Thereafter on April 10, 2002, Special Counsel forwarded a stipulation to Judge Cope's counsel attached as Exhibit 16. The more pertinent provisions in that

stipulation which establish the selective and vindictive character of the continued prosecution of those charges are set forth here. Notably, this stipulation acknowledges not only insufficient evidence, but further admits charges are false.

> "3. Because of the extremely serious nature of the charges brought against Judge Cope in this proceeding, and through parallel criminal charges in California, and the notoriety attendant upon widespread publication of such serious allegations, the Investigative Panel deems it imperative in the interest of justice that this stipulation precisely detail the evidentiary basis for the conclusions adopted herein as they pertain to each count."

16. With regard to the allegations in Count I that Judge Cope "wandered," "eavesdropped," and "interposed himself in a personal conversation," the stipulation asserted:

> "Due to the daughter's intoxicated state and some inconsistencies in her statements, the Special Counsel cannot prove by clear and convincing evidencing that the daughter is correct. Accordingly it is stipulated for purposes of these proceedings that Judge Cope's version is correct."

17. As for the balance of the alleged conduct the rest of the first evening, including the conduct on the beach and the conduct in Judge Cope's hotel room as alleged in paragraphs 1 through 8 of Count I and Count III (Inappropriate Conduct of an Intimate Nature), the stipulation provided:

> "Judge Cope states that the daughter decided she did not want to continue the encounter, got dressed and left. **Judge Cope did not attempt to force her to have sex with him in any way, and when she said she wanted to stop, he stopped**. - - Due to the daughter's intoxicated state and some inconsistencies in her statements, the Special Counsel cannot prove by clear and convincing evidence that the daughter is correct. Accordingly, it

is stipulated for purposes of these proceedings that Judge Cope's version is correct."[28]

18. Concerning the allegations in Count II, IV, and V, charging Judge Cope with theft of the key, attempted forcible entry, and lying to police the stipulation provided in pertinent part:

> "Due to the daughter's drinking earlier on the evening of April 4th and some inconsistencies in her statements, the Special Counsel cannot prove by clear and convincing evidence that the daughter is correct. Accordingly it is stipulated for purposes of these proceedings that Judge Cope's version is correct (**i.e., that he did not take the key and was not the man at the door**)."
>
> "When the police officers took Judge Cope to the station for booking, he told the officers he had just come from a restaurant that he described as green and white. The officers asked him if it was the Grill on Ocean Avenue, and he stated that it was. Because they knew that the restaurant named the Grill on Ocean Avenue had closed more than an hour before Judge Cope was arrested, the officers believed Judge Cope was providing a false alibi.
>
> Subsequent investigation by the Special Counsel has revealed that the restaurant that Judge Cope was referring to was a different restaurant named Il Fornio, which was opened late that night. Judge Cope mistakenly thought this was the "Grill on Ocean Avenue" the name suggested by
> the police officers, because it a large open grill and was located on Ocean Avenue.[29]

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[28] As will be seen, Special Counsel drafted a proposed "Findings and Recommendations of Discipline" which notably falsely contravened those stipulated facts, it went so far as to question Judge Cope's "moral character" and accused him of "adulterous" conduct.

[29] The above cited provisions from the stipulation directly pertain and corroborate the admissions of Special Counsel and General Counsel that the referenced charges could not be proven. While the entire stipulation had been appended hereto, the court should be aware that many of the propositions submitted in the stipulation by Special Counsel, notwithstanding his ultimate admissions, are themselves false and unsubstantiated in the evidence. For the purposes of this motion, disclosure of material statements made by the General and Special Counsel during the course of settlement discussions are appropriate and necessary. *See, e.g., Bordenkircher v. Hayes*, 98 S.Ct. 663 (1979); *United States v. Goodwin*, 102 S.Ct. 2485 (1982)

19. In order to justify and/or conceal its failure to investigate in the first place prior to bringing formal charges, and in order to justify the public opprobrium that was maliciously brought on Judge Cope by the filing of false charges, the JQC thereafter sought

to compel Judge Cope to plead to conduct alleged in Count III for which the JQC, nor any other judicial oversight body in the United States has ever asserted jurisdiction: to wit, private consensual conduct which violated neither criminal laws nor the Constitution of the

State of Florida. They sought to compel a plea not only to conduct which is private and falls within the zone of protected conduct under both the Florida and federal Constitutions, they sought to compel Judge Cope to admit to aggravating circumstances concerning that conduct which were unsupported in the evidence and in fact conclusively refuted in the evidence. This was done solely to appeal to the court of public opinion and provide after the fact justification for the public scandal the JQC had helped to precipitate through its own misconduct in failing to investigate the facts before filing the criminal charges which were never supported in the evidence.

20. In a conference with Mr. MacDonald, Mr. Mills, Mr. Kwall and Mr. Magri on March 27, 2002, Mr. MacDonald impliedly admitted that the charging decision whereby Judge Cope was formally charged was carried out because of the publicity and public pressure. In Mr. MacDonald's words "we had to do something" because of Cope's arrest. Regrettably the something that the Investigative Panel had to do was to investigate the allegations, not issue a rubber stamp charging document mimicking false criminal charges in California.

21. At that conference Judge Cope offered to plead to simple public intoxication while in California with the aggravated allegations enumerated in paragraphs 1 through 8 of that count stricken per the admission of Special Counsel that the evidence proved otherwise. He further offered to plead to the allegations in

Count VI, notwithstanding that he had no notice of a requirement to report to the JQC of the events in California and notwithstanding that Executive Director Brooke Kennerly of the Judicial Qualifications Commission had been quoted in the newspapers months earlier as stating that Judge Cope was under no such obligation and further notwithstanding that he disclosed the facts fully to his Chief Judge Susan Schaeffer. ("Judges Arrest Stuns Peers," St. Pete Times, July 13, 2001)

22. Judge Cope further offered to acknowledge responsibility for the conduct that the evidence established under Count III, notwithstanding that the "victim" herself had denied any such offending conduct and notwithstanding further Special Counsel's earlier acknowledgement that the JQC had no jurisdiction over the brief intimate conduct in the privacy of Judge Cope's hotel room.

23. On April 4, 2002, Special Counsel provided a proposed Findings and Recommendations of Discipline (Exhibit 17) which for the first time and contrary to the evidence established in the case, purported to make a finding that Judge Cope engaged in "adulterous" conduct, raised questions about Judge Cope's "moral character" and further purported to find that Judge Cope took advantage of the Woman in California due to her intoxicated state and asserted emotional vulnerability.

24. Judge Cope objected to these findings on the grounds that they were outrageously false, gratuitously inflammatory, totally unsupported in the evidence and would be impermissibly stigmatizing.[30]

25. On April 10, 2002, Special Counsel tendered a stipulation which, as noted above, stated in part: "**Judge Cope did not attempt to force her to have sex with him in any way, and when she said she wanted to stop, he stopped**"

26. On April 22, 2002, Judge Cope appeared before the Investigative Panel with counsel. At that time the Investigative Panel was advised of the facts established during the course of discovery, the stipulated insufficiency of the evidence in Counts II, IV, V and the majority of Count I, and the case law and facts which established Count III should be dismissed and that no predatory conduct occurred. The Investigative Panel was also advised that the California prosecutor had advised Judge Cope's California counsel that if the JQC determined its charges could not be proven by the clear and convincing standard of proof, then California would be compelled to dismiss all of the pending criminal charges in California on the basis they could not be proven beyond a reasonable doubt.

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[30] A truly astounding aspect of the entire process has been Special Counsel's penchant for utterly disregarding facts that stand in the way of his objectives. For example, Judge Cope reports that the Woman was an entirely willing partner and he did not in any way take advantage of her. The Woman testified that Judge Cope never took advantage of her and she was sobering up before even leaving the beach. Insisting that Judge Cope falsely acknowledge taking advantage of the Woman, Special Counsel asserted "What Lisa's testimony was about her subjective state is largely irrelevant to Judge Cope's culpability. Moreover, the whole premise of the stipulation is that we will accept Judge Cope's version, not Lisa's." Thus, Special Counsel purports to make a finding which is unequivocally denied by both participants! This is very similar to Special Counsel's latest representation concerning the charge in Count IV that Judge Cope "peered into the room." All witnesses have denied that occurred, or even could have occurred, including the women in the room. Insisting on prosecuting this charge nonetheless, Special Counsel asserted: "Whether Respondent actually looked inside the room or not is irrelevant."

27. Within a few days of the appearance before the Investigative Panel, MacDonald advised Kwall of its decision that Judge Cope would be required to acknowledge the objectionable predatory language in connection with Count III.

28. Thereafter further efforts were undertaken by Kwall to resolve the impasse with MacDonald. Kwall met with MacDonald and proposed a disposition to be forwarded to the JQC omitting the objectionable language in Count III. Mr. MacDonald advised Mr. Kwall that removing the predatory aspect of the charge would require Judge Cope to accept a 60 day suspension without pay as opposed to the previous demanded 45 day suspension. Remarkably, further attesting to the legitimacy of this motion, General Counsel MacDonald ultimately demanded a "price" of a greater penalty for a lesser offense.

29. Thereafter Mr. MacDonald advised Kwall that the JQC had instructed that the predatory language remain. Further the JQC instructed that if Judge Cope did not plead to such allegation, the Special Counsel would be instructed to prosecute all of the counts (including the counts which had been expressly acknowledged could not be supported in the evidence). Further the threat was communicated to Mr. Kwall that if Judge Cope exercised his right to trial on those counts, and he was convicted, he would be removed from office.[31] On information and belief, the JQC adopted this

[31] Rule 19 of the Rules of the Judicial Qualifications Commission requires the vote of four members of the Hearing Panel in order to recommend removal of a judge from office. MacDonald's threat that if Judge Cope defended himself on charges, even those which admittedly were unsupported by sufficient evidence, in and of itself establishes the selective and vindictive character of this prosecution. It also disturbingly evidences a fact, which is believed discovery would establish conclusively, that judges who defend themselves on charges brought by the Investigative Panel are uniformly punished merely for the fact of defending themselves. It also disturbingly suggests that the Investigative Panel (or more likely MacDonald), perceives it can short cut the due

illegal position and was and is determined to prosecute charges which admittedly cannot be supported in the evidence in order to go overboard rather than be perceived as being too lenient.

30. Thus, General Counsel for the Investigative Panel acknowledged that Judge Cope would be expressly penalized for exercising his right to trial by a malicious prosecution on charges which the JQC had earlier acknowledged could not be supported in the evidence. Finally, when Mr. Kwall pointed out that Judge Cope did not want to publicly air the misconduct of the Woman, Mr. MacDonald acknowledged to Mr. Kwall that the evidence established that the "victim" was lying in her allegations against Judge Cope.

FURTHER EVIDENCE OF SELECTIVE AND VINDICTIVE PROSECUTION

31. In response to interrogatories earlier submitted, Special Counsel on May 17, 2002, indicated his intention to place evidence before the Hearing Panel which Special Counsel knew was false with respect to the following interrogatories and responses:

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process of the Hearing Panel by threats and intimidation intended to coerce a judge to knuckle under and abandon his or her right to a hearing. This alarming prospect, is further evidenced by the stipulation forwarded to Judge Cope's co-counsel by the Special Counsel in this case, after Special Counsel admitted he had insufficient evidence to support the criminal allegations in the formal complaint. Therein, Special Counsel asserted "Judge Cope's initial denial of all the allegations and his failure to disclose are also related to his alcohol problems in that he has suffered from denial."

This false statement, sends three messages. First, it corroborates the proposition that a judge may not deny allegations or defend against them without penalty. Second, it improperly and publicly suggests that Judge Cope was lying as a consequence of alcohol abuse when he appropriately denied the false charges brought by the JQC. Third, the false language was intended to publicly gloss over the fact that no investigation was done and no evidence existed to bring the charges in the fist place. Notwithstanding his admission that the majority of Count I and Counts II, IV and V were untrue, Special Counsel refused to delete this false language from the stipulation.

> *"3. Define the terms "loitered" and "prowled" as used in Count IV of the Amended Notice of Formal Proceedings.*
>
> **The terms are used in this context to allege that Judge Cope came onto the property of the Normandy Inn. The terms are also denote [sic] that Judge Cope did not have a lawful reason to come onto the property in the first place, remained on the property without any lawful reason once he discovered the door to Room 306 was locked, and/or was in search of a sexual partner.**

This remarkable statement announces a theory and supposed facts which Special Counsel knew were expressly repudiated in the evidence. Special Counsel knew and had admitted that Judge Cope's testimony was true; and that Judge Cope was not even on the premises!

> *8. Specify every person who has knowledge of the allegations in paragraph 18 of Count IV (Prowling and Attempted Forceful Entry) of the Amended Notice of Formal Proceedings and specify the nature of those persons' knowledge.*
>
> **Lisa Jeanes has knowledge that the key was lost during the time that Respondent was present and that Respondent used the key when he tried to open the door to her room at the Normandy Inn.**

Here again Special Counsel knew and had admitted that the evidence established that Judge Cope never possessed or used the key. He further knew the key was reported lost at a time and place before Judge Cope ever met the women. He further knew, that according to Lisa Jeanes' deposition testimony, Judge Cope could not possibly have taken the key.

> *10. Describe with particularity the evidence supporting the allegations that the Respondent "began eavesdropping on the personal conversations of a grown woman and her mother "as alleged in paragraph 2 of Count I of the Amended Notice of Formal Proceedings; and where the*

Respondent was specifically located when the alleged "eavesdropping" occurred.

The Special Counsel objects to this interrogatory as overly broad and an improper "contention interrogatory." Subject to this objection, the Special Counsel points to the expected testimony of Lisa Jeanes. The specific location of Respondent is known only to Respondent.

Special Counsel knew that "the expected testimony of Lisa Jeanes" if consistent with her deposition, would be that she had no evidence of such eavesdropping and in fact made admissions that it did not occur. Hence the non-responsiveness of this answer in refusing to "describe with particularity the evidence."

14. Identify the evidence supporting the allegation in paragraph 17 of Count IV of the Amended Notice of Formal Proceedings alleging that the Respondent "peered inside" the hotel room inhabited by the two women.

The Special Counsel objects to this interrogatory as overly broad and an improper "contention interrogatory." Subject to this objection, the fact that Respondent repeatedly banged into the door after opening it as far as the chain lock would allow supports the inference that Respondent peered into the opening. Whether Respondent actually looked inside the room or not is irrelevant to the impropriety of his conduct.

Note here the "slippery slope" Special Counsel substitutes for due process. The criminal charge expressly and unambiguously accuses Judge Cope of "peering inside the room." **Now we are told that whether Judge Cope "actually looked inside the room" is irrelevant**?

15. Specify the evidence you contend supports the allegation in paragraph 19 of Count IV of the Amended Notice of Formal Proceedings alleging that the Respondent "attempted to break the door in forcibly."

> **The Special Counsel objects to this interrogatory as overly broad and an improper "contention interrogatory." Subject to this objection, Lisa Jeanes will testify that Respondent repeatedly banged into the door after opening it as far as the chain lock would allow.**

Once again, Special Counsel earlier admitted that Judge Cope "did not take the key and was not the man at the door." Moreover, Special Counsel knew that Lisa Jeanes could not truthfully testify that Judge Cope "repeatedly banged into the door." She told police the door merely pushed against the chain. The police officer testified the described conduct could not have occurred. Lisa Jeanes could only testify that the man at the door had "a round face and big ears."

32. As noted, Special Counsel apologized to Judge Cope on March 22, 2002, for doubting Judge Cope's veracity and thereafter stipulated that Judge Cope "did not take the key and was not at the door."

33. Through the above interrogatory responses, Special Counsel has now admitted his intention to place false testimony before the Hearing Panel in an effort to establish charges he had admitted were not true.[32] That conduct would directly violate Rule 4-3.8 of the Rules of Professional Conduct and ABA Standard 3-5.6(a) which provides:

> "A prosecutor should not knowingly offer false evidence - - or fail to seek withdrawal thereof upon discovery of its falsity."

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[32] Frankly, the above cited interrogatory responses by Special Counsel in the circumstances are, or should be, embarrassing to the JQC. Imagine charging someone with looking into a room, and after the "victim" and police officer testify that no one looked in the room or could have looked into the room, the prosecutor claims that whether that actually happened is "irrelevant!"

34. On information and belief, the JQC deliberately refused to dismiss the charges which admittedly could not be substantiated in order to further intimidate and coerce Judge Cope, to leave him subject to the continued threat of prosecution on the identical criminal charges in California, to subject Judge Cope to further inflammatory and false publicity and to bludgeon Judge Cope's emotional resolve[33], all for the purpose of compelling his resignation.

35. On May 13, 2002, Special Counsel advised he was releasing deposition transcripts to the St. Petersburg Times. He did this, on information and belief, knowing that the St. Petersburg Times would use the transcripts to publish articles on this case. Respondent submits Special Counsel at that time and with that knowledge had a duty to advise the media that Counts II, IV, V and the majority of Count I could not be substantiated and would be dismissed.

36. On May 16, 2000, the St. Petersburg Times published an inflammatory and sensational article containing false allegations and omissions of material fact, which Special Counsel and General Counsel knew were false and misleading. The article placed Judge Cope in a false light and absent appropriate and necessary public correction by the JQC, conveyed to the public a posture of the case and view of Judge Cope's conduct which the JQC knew was false. On information and belief, both further knew such false allegations would be extremely damaging to Judge Cope.

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[33] Special Counsel at all times has known that Judge Cope is a recovering alcoholic, a difficult enough process without the public beating routinely administered by Special Counsel's tactics. .

37. On May 21, 2002, the St. Petersburg Times carried a mocking article, "Those Problematic Panties" which again took facts out of context, and falsely alleged that Judge Cope "groped" the Woman on the beach. Special Counsel and General Counsel knew such allegation was false; and by continuing to refuse to dismiss the charges, and refusing to publicly correct the distortions and falsehoods in the press whereby Judge Cope would be continually and repeatedly excoriated in the media, they hoped to compel his resignation.

38. On May 21, 2002, the St. Petersburg Times published a false and inflammatory editorial "Court Needs Better Judgment." In that editorial the newspaper falsely alleged that Judge Cope "conspired with Chief Judge Susan Schaeffer to keep the fact of his arrest from the Judicial Qualifications Commission."

39. The editorial went on to repeat the false charges in California (which the JQC two months earlier stipulated were not true) and further falsely asserted "While Cope denies the charges, he has given wildly conflicting accounts of what happened that night." On information and belief, Special Counsel and General Counsel knew such allegations were false, and intended that the failure to correct such falsehoods would further irreparably damage Judge Cope's reputation for integrity, compromise his ability to serve as a Judge, harm him emotionally and force his resignation.

40. The editorial curiously asserted Cope "doesn't belong on the bench, regardless of the validity of the criminal charges."

41. On Friday, May 24, 2002, Judge Cope's co-counsel Kwall spoke to General Counsel MacDonald. At that time MacDonald stated to Kwall, "I'm waiting for Cope to quit."

ARGUMENT

The conduct of the JQC in this matter is a monstrous affront to due process. It is patently clear that the allegations in this motion establish a prima facia case of selective and vindictive prosecution.

It is well settled that proceedings directed against a judge by the JQC must satisfy procedural due process; and such due process requires the JQC to be in substantial compliance with its procedural rules. *In re: Graziano* 696 So.2d 744 (Fla. 1997).

Rule 6 of the Rules of the Judicial Qualifications Commission require that formal charges may not be filed against a judge absent an investigation and determination of probable cause to file the charges. Article V, Section 12(a) of the Florida Constitution charges the Commission with a constitutional duty to investigate. *See also, Inquiry Concerning a Judge Re: Fletcher*, 664 So.2d 934 (Fla. 1995).

The Respondent here does not contend that there was mere "inadequacy" of investigation. Rather there was no investigation whatsoever, particularly as to Counts II, III, IV and V.[34] The Commission took no testimony, sworn or unsworn, to support the criminal charges filed against Judge Cope. Indeed the only person interviewed by the JQC investigator prior to the filing of the notice of formal charges was the alleged victim's mother. She was asked only if they had ever found their room key and refused to provide further information. The loss of a key cannot in any rational sense be translated into probable cause to charge Judge Cope with theft of a key.

The Supreme Court has addressed the due process issue in connection with the sufficiency and reliability of information before the JQC in order to support a suspension of a judge without compensation. In the case of *In re: Shenberg*, 632 So.2d 42 (Fla. 1992), the JQC issued an order to show cause why the Commission should not recommend that judges be suspended from their judgeships without compensation. The judges had been charged in a fourteen count indictment handed down by a federal grand jury with a variety of serious federal crimes. The judges failed to attend the order to show cause proceeding, and the JQC sent its report and recommendation to the Supreme Court, which thereafter issued an order suspending the judges without compensation.

In attacking the validity of the Supreme Court's order, the judges asserted three due process violations. Whereas in the past the Supreme Court had required that a recommendation of suspension without compensation be supported by facts, the Supreme Court noted in *Shenberg* the significance of the grand jury indictment in permitting such a suspension in that such indictments "carry an indicia

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[34] Judge Cope admitted through counsel prior to the charges being brought that he was in fact intoxicated in California.

of reliability because the charges are made by an independent body that based its findings on sworn testimony" (*Shenberg* at 46). The court went on to note that if the allegations of the criminal misconduct had been brought by an information or direct filing, "we would have deemed it appropriate to make a probable cause inquiry before acting on the JQC recommendation to suspend the petitioners without compensation. Thus we hold that the grand jury indictment provides probable cause that the petitioners have engaged in misconduct making them unfit to serve" (*Shenberg* at 46).

The implications of this holding are clearly pertinent to the facts here. Judge Cope was charged in California pursuant to an unsworn citizen's arrest and by direct filing. Since the Supreme Court has expressly held that such unsworn charges cannot constitute probable cause, it is clear that the Commission's reliance on such unsworn charges to rubber stamp identical criminal charges here, is a fundamental violation of the Respondent's due process rights. Indeed filing formal charges against the Respondent which are criminal in character without conducting a probable cause investigation is a substantial and impermissible departure from the requirement that the proceedings against Judge Cope be "essentially fair." *See, In Re: Graham*, 620 So.2d 1273, 1276 (Fla. 1993).

In *Graziano*, supra, the Supreme Court reiterated that the confidentiality mandate pursuant to Article V, Section 12(d) of the Florida Constitution as implemented by Rule 24(a) exists to permit the JQC to process efficiently complaints from any and all sources while protecting the complainant from recriminations and the judicial officer from unsubstantiated charges. *See, Forbes v. Earl*, 298 So.2d 1, 4 (Fla. 1974). The necessary corollary to the fact and reason for such confidentiality, is that a probable cause investigation in fact go forward in order to protect the judicial officer from unsubstantiated charges. Here, as more fully discussed above, the evidence adduced from the witnesses courtesy of the Respondent's own discovery efforts, who were known to but never contacted by the JQC prior to charging the Respondent, establishes that there was not even probable cause to file the criminal charges against Judge Cope. Consequently, the Commission not only failed in its primary duty to protect Judge Cope from unsubstantiated charges, it deliberately violated that duty and gravely harmed Judge Cope with public unsubstantiated criminal charges it refused to investigate.

In the case of *In Re: Fletcher*, 666 So.2d 137 (Fla. 1996), the Supreme Court revisited this sufficiency of a proposed recommendation for disposition. Prior to remand to the Commission earlier, the Supreme Court was critical in that the stipulation did not set forth any factual basis upon which the Supreme Court could properly evaluate the recommendation of discipline. On return of a recommendation to the Supreme Court thereafter, the Court accepted the stipulation and recommendation of the Commission. In an opinion in which he specially concurred, Justice Anstead agreed with the dissent that the Commission appeared to have missed the point of the remand but accepted the recommendation nevertheless in the belief that the matter should be "put to rest."

Justice Anstead's remarks are particularly apropos of the failure of the Commission in this case to investigate before filing formal charges. He stated:

> "The Commission's recent response advising us that it had thoroughly investigated the case is a non sequitur and provides no additional light or guidance to this Court in carrying out its heavy responsibility to supervise the conduct of the judges of this State. - - - the Commission now tells us that it exhaustively investigated the case and this is the best

> that it could do. One possible inference from all this is that the Commission acted entirely to hastily in initially charging the judge with serious allegations of misconduct that had not been fully investigated and that could not be proven." (*Fletcher* at 138) [Emphasis added.]

Here, the facts are conclusively established that the Commission charged Judge Cope with egregious criminal conduct with no investigation at all, and which cannot be proven.

In his dissenting opinion Justice Wells likewise made remarks pertinent to the situation that pertains here. Justice Wells noted that the original charges brought by the Commission were that the respondent collided with a dock while operating a boat under the influence of alcohol and lied to a Florida Marine Patrol Officer when confronted. Justice Wells complained that the Commission's recommendation continued to fail to address the factual underpinning of the charges. He stated:

> "We cannot fulfill this responsibility (deciding discipline of judges) by acting upon recommendations of the Commission that do not directly address charges which have been brought against a judge. Pursuant to our constitution, which has structured a judicial disciplinary system to prosecute any wrongdoing by judges, the public has a right to have any charges of wrongdoing either found to be supported or dropped."

Fletcher at 139.

The Supreme Court has thus made crystal clear its condemnation of what occurred in this case - - a total failure to investigate serious criminal charges which were leveled against Judge Cope without any evidence; and the continuing refusal to promptly drop the charges which were (inevitably) found to be unsupported.

EACH OF THE SIX COUNTS OF THE FORMAL CHARGES ARE IMPROPERLY SELECTIVE AND DISCRIMINATORY

The Fourteenth Amendment prohibits any state from taking action which would "deny to any person within its jurisdiction equal protection of the laws." The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of the laws. The basic principal was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6th Supreme Court 1064, 1073 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make an unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

In *U.S. v. Cyprian*, 23 F.3d 1189, 1195 (7th Cir. 1994), the Seventh Circuit Court of Appeals described the elements of impermissible selective prosecution as follows:

> To make out a prima facia case of selective prosecution, defendants must show that: 1) they were singled out for prosecution while other violators similarly situated were not prosecuted; 2) the decision to prosecute was based on arbitrary classifications such as race, religion, or the exercise of constitutional rights [emphasis added] [authority omitted].

Accord, United States v. Lamberti, 847 F.2d 1531, 1535 (11th Cir. 1988). The Florida Supreme Court has also recognized the discretion of a prosecutor is not unfettered. *In State v. Bloom*, 497 So.2d 2, 3 (Fla. 1986), the Court noted the following principals:

> "[T]he decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor. This discretion has been curved by the judiciary only in those instances where impermissible motives may be attributed to the prosecution,

> such as bad faith, race, religion, or desire to prevent the exercise of the defendant's constitutional rights." [emphasis added]

See also, *Grier v. State*, 605 So.2d 503 (2nd DCA 1992) (charges based on "discriminatory motive or ethical taint would pose grave constitutional problems").

The court in *United States v. Bourque*, 541 F.2d 290, 293 (1st Cir. 1976) also noted that personal vindictiveness would constitute discriminatory prosecution:

> . . . personal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution would also sustain a charge of discrimination [emphasis added].

In *State v. Parrish*, 567 So.2d 461 (1st DCA 1990), the court affirmed the dismissal of an information on the grounds of selective or discriminatory prosecution when it inferred from the circumstantial evidence that the prosecution of the defendants, like the one here, was politically motivated. The court explained that the test for selective or discriminatory prosecution involved two parts. The first part requires a showing that the Defendant was prosecuted while others similarly situated were not. The second part of the test requires a showing that the discriminatory selection of the Defendant for prosecution was invidious or done in bad faith. The court stated the following concerning the second part of the test:

> The second part of the selective prosecution test requires a showing that the discriminatory selection of the defendant for prosecution has been invidious or in bad faith, in that it rests upon such impermissible considerations as race, religion, or the desire to prevent the exercise of political rights [emphasis added] [authority omitted].
>
> To demonstrate discriminatory purpose, a Defendant must establish that (1) he was singled out for prosecution although the government was aware that others had violated the law, and (2)

> the government had followed unusual discretionary procedures in deciding to prosecute. [authority omitted] In determining whether "a defendant has established selective prosecution, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'."
>
> To establish the second part of the selective prosecution defense, it was incumbent upon [defendant] to show that the decision to prosecute was based on a desire to prevent her exercise of constitutional rights, i.e., her right to run for public office [authority omitted].

567 So.2d at 467. See also, *United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973) (en banc) (government was required to come forward with evidence to explain why the Defendant "was being singled out for prosecution in contravention of the government's own procedures").

It is not necessary to show that laws were selectively or discriminatorily enforced against a particular class, rather relief must be granted where there is intentional or purposeful discrimination against an individual. *U.S. v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973) (en banc); *State v. Parrish*, 567 So.2d 461 (1st DCA 1990); *Taylor v. U.S.*, 798 F.2d 271 (7th Cir. 1986). Furthermore, the discriminatory or selective motive of a law enforcement agency will be attributed to the prosecution. See, *U.S. v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (conviction reversed because of purposeful discrimination by census authorities); *U.S. v. Bourque*, 541 F.2d 290 (1st Cir. 1976) (charge of discrimination may be based on conduct of "responsible member of the administrative agency recommending a prosecution"); *State v. Parrish*, 567 So.2d 461 (1st DCA 1990). Thus if Judge Cope was similarly situated to others and singled out for investigation and prosecution, either by an agency or in this case the JQC under circumstances where the JQC has not followed its usual

discretionary procedures, or to prevent the Defendant from exercising his political or constitutional rights, or because of bad faith and personal vindictiveness the prosecution is unconstitutional.

It cannot be contested that the proceedings before the Judicial Qualifications Commission are governed by due process precepts prohibiting selective and vindictive prosecutions. See e.g., *The Florida Bar v. Davis*, 361 So.2d 159 (Fla. 1978)("With such a clear rule, members of the Bar need not fear selective prosecution."); *In re Disciplinary Matter Involving Triem*, 929 P.2d 634 (Ala. 1996)(addressing claim of vindictive prosecution in Bar disciplinary proceeding).

STANDARD OF PROOF FOR DISCOVERY

In order to obtain discovery on the issue of selective prosecution, the courts have held that a defendant need only show a "colorable basis" or "colorable entitlement" to the defense. In, *U.S. v. Heidecke*, 900 F.2d 1155, 1158 (7th Cir. 1990), the court held that it was firmly settled that in order to compel discovery on the issue of selective prosecution, the defendant need only show a "colorable basis" for the claim. Similarly, in *U.S. v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987), the Eleventh Circuit stated:

> The evidence submitted indicates that Gordon has sufficiently established the essential elements of the selective prosecution test to prove a "colorable entitlement" to the defense. [authority omitted]. Thus Gordon is entitled to an evidentiary hearing on the selective prosecution claim so that the full facts may be known. Gordon is entitled to discovery of relevant Government documents relating to the local voting fraud cases the Government has prosecuted and any voting fraud complaints which they have decided not to pursue.

A "colorable basis" is "some evidence tending to show the essential elements of the claim." The defendants claim must only "arise above the level of unsupported allegations." *U.S. v. Heidecke*,

supra., at 1159. *See also, U.S. v. Benson*, 941 F.2d 598 (7th Cir. 1991). The rationale for such a low burden of proof was described in *U.S. v. Heidecke, supra*. at 1159, as follows:

> The defenses of selective prosecution and vindictive prosecution both require the defendant to probe the mental states of the prosecutors. Requiring the defendant to prove more than a colorable claim before compelling discovery might prematurely stifle a legitimate defense of vindictive prosecution for lack of evidence.

STANDARD OF PROOF FOR HEARING

As noted above, the Eleventh Circuit Court of Appeals held in *U.S. v. Gordon, supra.* at 1540, that a defendant is entitled to an evidentiary hearing on the selective prosecution claim if he has submitted evidence of a "colorable entitlement" to the defense. Other courts have held that to obtain an evidentiary hearing, the defendant must proffer "sufficient evidence to raise a reasonable doubt that the government acted properly in seeking the indictment." *U.S. v. Cyprian, supra.* At 1195.

BURDEN OF PROOF AT HEARING

Once a *prima facie* case is presented by the defendant, the "burden of going forward with proof of non-discrimination will then rest on the government" at the evidentiary hearing. "The government will be required to present compelling evidence to the contrary if its burden is to be met." *United States v. Falk*, 479 F.2d 616, 624 (7th Cir. 1973) (en banc).

It is clear that Judge Cope was singled out for prosecution on the charges brought. Judge Cope is similarly situated with every other jurist against whom allegations of judicial misconduct are brought. No other jurist however has heretofore been charged by the JQC without an investigation into the allegations and a proper determination of the probable cause to bring the allegations. Rule 6 of the Florida Judicial Qualifications Commission rules mandates that the Investigative Panel may only

file formal charges upon a finding of probable cause. Probable cause is defined as "reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in belief that the person accused is guilty of the offense with which he charged."

In addition to the admissions by both Special Counsel of the JQC and General Counsel of the Investigative Panel that no such investigation was conducted and the charges were filed in response to political pressure, it is clear that had an investigation been conducted, even cursorily, the Investigative Panel would have been forced to conclude that Judge Cope could not have even been reasonably suspected of the allegations in Counts II through V.

For example, the Investigative Panel took no statements from any of the investigating police officers or any witnesses who were likely to have material information concerning the allegations. Had the panel for example interviewed the investigating police officer and investigator for the District Attorney's Office they would have learned that the "victim's" allegations supporting Count III of the Notice of Formal Charges had been recanted six months prior to the vote to charge Judge Cope with that count. Had the Investigative Panel interviewed the manager of the hotel where the women stayed, they would have learned that the key subject to the theft count in Count II was reported lost at a time and under circumstances before the women ever met Judge Cope.

Had the Investigative Panel interviewed a single police officer involved in the case they would have learned immediately that the "victim" had made false and inconsistent reports to police.

Had the Investigative Panel bothered to even interview the "victim" they would have learned that there was no basis to even suspect that Judge Cope attempted to forcibly enter the women's room.

The Investigative Panel did none of these things. The only witness contacted by an investigator for the Investigative Panel prior to the filing of formal charges was the 64 year old alcoholic mother. The only question asked of that witness was whether she or her daughter had ever located their room key.[35] In addition, the police reports available to the Investigative Panel nowhere referenced any accusation by any witness that the Respondent had stolen the room key. Accordingly, the only basis upon which the charge of theft was brought against Judge Cope was the fact that a similar charge had been filed in California. Had the Investigative Panel conducted a minimal investigation, it would have learned that the charge filed in California was not predicated on any sworn testimony and was not filed under any oath.[36]

In addition, Judge Cope is being prosecuted under Count III for private, consensual conduct which was not illegal and which is expressly protected under the Florida and federal constitutions. Whereas Judge Cope engaged in a brief intimate encounter in the privacy of his hotel room which did not approach the level of sexual intercourse, virtually contemporaneous with charging Judge Cope with such conduct, the JQC exonerated another circuit court judge notwithstanding conclusive evidence that that judge had engaged in a years long extramarital affair with a courthouse employee which had been the subject of rumor and scandal.

Next, the Investigative Panel conducted no investigation whatsoever to determine whether in fact Judge Cope lied to police as alleged in Count V of the formal notice. Had they done so they

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[35] The report of the interview conducted by telephone October 22, 2001, was read to Judge Cope's counsel, but not provided. The report indicated that the witness was reluctant to provide any other information.

[36] The Investigative Panel was advised of this fact by Judge Cope's counsel prior to the charging decision in conjunction with counsel's request that the Investigative Panel conduct a meaningful investigation to determine whether probable cause existed.

would have learned, as Special Counsel has now admitted, that Judge Cope did not lie and there was no evidence that he lied.

Next, Judge Cope is charged in Count VI with failure to notify the JQC of his arrest. This charge was likewise selectively and discriminatorily brought against Judge Cope. Other judges similarly situated have not been so charged. Moreover, the Executive Director of the JQC Brooke Kennerly was quoted in the St. Petersburg Times on July 13, 2001, as stating that no judge is under an obligation to report an arrest to the JQC.

THE JQC FOLLOWED UNUSUAL DISCRETIONARY PROCEDURES

The usual discretionary procedures for the JQC in similar cases were not followed here. First, the JQC has declined in the past to prosecute judges for legal, private, constitutionally protected sexual conduct. Even where such conduct approaches the level of repeated acts of sexual intercourse, the JQC has declined to prosecute. The JQC has declined to investigate homosexual conduct captured on a photograph. The only instances whereby judges have been prosecuted and disciplined for sexual conduct are those instances where the conduct was conducted pursuant to either a criminal course of action or in a notoriously public and flagrant manner.

THE JQC HAS ACTED IN AN EFFORT TO PREVENT JUDGE COPE'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO TRIAL ON THE CHARGES

Under the Sixth Amendment to the United States Constitution Judge Cope has a constitutional right to trial (on the charges). This right is further guaranteed by Rule 15 of the Rules of the Judicial Qualifications Commission. Here the state through JQC Special Counsel and General Counsel have threatened Judge Cope that if he goes to trial on the pending charges he will be removed from office.

This is consistent with a pattern of intimidation which on information and belief the Investigative Panel has long pursued.

The threat is particularly outrageous where as here the State has continued to prosecute the most onerous of the charges (Counts II, IV, V) notwithstanding its admission that insufficient evidence exists to sustain such charges. Moreover, the JQC, through its Special and General counsels, sought by such threat to compel Judge Cope to plead guilty to Count III and more specifically to acknowledge responsibility for taking advantage of the "victim" when no evidence exists to support such proposition, the evidence expressly contravenes such a proposition and the "victim" herself denied that the conduct even occurred and acknowledged that Judge Cope never took advantage of her at any time. Moreover, the State insisted that it would not only not dismiss the charges for which insufficient evidence existed, but it would also insist on a Draconian sanction of 45 days suspension without pay.

The bad faith and political motive of the prosecution here is further demonstrated by the order issued by the JQC to continue to prosecute charges which both Special Counsel and General Counsel for the JQC have acknowledged are without merit. Indeed the evidence marshaled during the investigation by Judge Cope after he was accused not only establishes that the charges must fail for lack of clear and convincing evidence; it establishes as well that probable cause doesn't even exist for allegations contained in paragraphs 1 through 8 of Count I, Count II, Count III, Count IV, and Count V. There could not be a clearer violation of the State's usual discretionary function than to continue to prosecute a person the State knew had not committed the alleged misconduct. The charges brought here are, with the exception of Count VI, clearly criminal in character. The American Bar Association

Standards for Criminal Justice Prosecution Function ("ABA Standard"), which Florida has adopted[37] states the following in pertinent part in ABA Standard 3-3.9:

> (a) A prosecutor should not institute or cause to be instituted or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, caused to be instituted or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. [emphasis added].

In contrast, the Special Counsel (prosecutor) in the instant case not only knows, but has admitted, that the charges of theft (Count II), attempted forcible entry (Count IV), and lying to police (Count V) cannot be sustained by sufficient admissible evidence.

The bad faith of the prosecution of this matter by the JQC may also be demonstrated by the actions of Special Counsel. Here Special Counsel: 1) admitted that no investigation was conducted before charges were filed; 2) admitted that he himself drafted the charges with the idea in mind that the women (victims) were liars; 3) made concerted efforts to obstruct Judge Cope's legitimate due process right to discovery by falsely advising the principal witnesses that Judge Cope's counsel intended and had threatened to "terrorize" them at their depositions and by encouraging them to hire private counsel; and 4) by falsely advising the Court that the proposed scope of the depositions was illegal, oppressive and harassing. In addition, Special Counsel proposed to videotape the discovery deposition of the female witnesses and use such at trial, depriving Judge Cope of the discovery aspect of that deposition. Moreover, when Judge Cope's counsel complained that such procedure would be blatantly unfair

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[37] See, Rule 4-3.8, Rules Regulating the Florida Bar.

Special Counsel asserted that he was not concerned with fairness to Judge Cope and that his job was to convict Judge Cope.

The bad faith of the JQC may also be demonstrated by the actions of the Special Counsel in seeking to have Judge Cope's former California counsel execute an affidavit which was false and was known or should have been know to be false by Special Counsel, by initiating contact with that attorney without notification to or permission from Judge Cope, and tendering on information and belief a false report to Judge Wolf concerning Judge Cope's mental status and supposed suicidal tendencies for the purpose of obtaining an illegal and oppressive order.

Moreover the bad faith of the JQC is further shown by its failure to investigate or to acknowledge the demonstrated perjury of its principal witnesses. A prosecutor has an independent duty and obligation to investigate allegations of misconduct. Here the evidence that the principal witness Lisa Jeans committed perjury at depositions and filed false police reports in California is overwhelming and conclusive. Notwithstanding, Special Counsel has continuously to the present sought to obstruct the discovery of such evidence and sought to protect Lisa Jeanes from the consequences of her own criminal conduct. In connection with the duties of a prosecutor to act fairly and to fully investigate, ABA Standard 3-3.11 also provides the following in pertinent part:

> (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

The commentary to ABA Standard 3-3.11 includes the following:

> A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether a disclosure to the offense may be required. The duty of a prosecutor is to acquire

> all the relevant evidence without regard to its impact of the success of the prosecution.

Here the JQC charged Judge Cope, *inter alia*, with eavesdropping and interposing himself into a personal conversation upon the false claim of Lisa Jeanes that she did not confide certain matters to Judge Cope and affirmatively seek his company. Those matters confided in Judge Cope included Jeane's report to him that she had a married boyfriend, that she had obtained a recent abortion, that her mother was a verbally abusive alcoholic and that she wanted to get away from her mother. Lisa Jeanes falsely denied under oath all of those confidences imparted to Judge Cope, just as she falsely denied initially reporting to police that Judge Cope attempted to rape her and made several forceful sexual advances against her on the beach. Not only did the JQC Special Counsel refuse to investigate such matters, which would have clearly demonstrated that Judge Cope has been the victim of false and malicious allegations, he or his colleague actively obstructed the discovery of such evidence. The record of the deposition of Officer Phillip Nash, to whom the "victim" made her original false reports, is replete with frivolous objections to virtually every question asked. It is further submitted that Special Counsel has a duty in the circumstances not only to investigate these matters which are harmful to his own case, but if appropriate affirmatively report such perjury to the JQC. Here, despite belatedly admitting that the principal witness was lying, Special Counsel and MacDonald refused to even acknowledge that fact in the stipulation tendered. This refusal to acknowledge this basic fact that the judge was falsely accused, itself puts the judge in a false and damaging light. As Special Counsel stated in his cover letter to the proposed stipulation, "I will not recommend that the panel approve a stipulation that finds as fact that Lisa is lying about whether she came back to Judge Cope's room or whether she saw Judge Cope at her door. It is not the place for the Commission to agree to findings detrimental

to a third party who is not a party to the stipulation." By failing to investigate wrongdoing by its own witnesses, the JQC is violating the ABA Standards prohibiting the intentional avoidance of information which would be helpful to the defense. This not only demonstrates the bad faith of the prosecution, but further shows that Judge Cope had been singled out for selective prosecution.

That the JQC has selectively and discriminatorily prosecuted Judge Cope in Count VI (Failure to Disclose Arrest) is patently clear from the facts of this case alone.

It is undisputed that Judge Cope reported all of the surrounding circumstances of his arrest by the Woman in California to Chief Judge Susan B. Schaeffer. She in turn reported it to incoming Chief Judge David Demers. Judge Schaeffer agreed that the matters need not be reported to the JQC. Moreover, Judge Schaeffer agreed that Judge Cope could continue in his judicial duties without disclosure of such facts. While Judge Cope believes that neither he nor Judge Schaeffer deliberately or otherwise violated any known judicial duty, in the circumstances at the time, it is clear that if the JQC considers Judge Cope guilty of such, then Judge Schaeffer must be considered equally as guilty. There is no question that Judge Schaeffer is similarly situated with Judge Cope; and she has not been prosecuted. Moreover, as Chief Judge, she was obligated under Canon 3C.(3) to ensure that Judge Cope complied with any duty to report to the JQC or to private litigants. The circumstances suggest either that the JQC wrongfully brought the charge against Judge Cope, knowing, as pointed out above, there was no duty to report (far more likely) or the JQC decided selectively and discriminatorily to prosecute Judge Cope rather than Judge Schaeffer because she enjoyed greater prestige than Judge Cope (being the Chief Judge and a previous candidate for the Florida Supreme Court) and/or because she was female. Either way, invidious discrimination has clearly occurred.

The foregoing demonstrates that Judge Cope was unconstitutionally selected for prosecution on all the charges filed. Consequently, the charges must be dismissed. In addition, as a separate and independent basis the charges must be dismissed, as argued below, on the grounds that the investigation and prosecution of these charges had been vindictive.

THE PROSECUTION OF THIS MATTER WAS VINDICTIVE

The court in *U.S. v. Cyprian*, 23 F.3d 1189, 1196 (7th Cir. 1994) stated the following concerning vindictive prosecution:

> A prosecution is vindictive, in violation of the Fifth Amendment due process clause if it is undertaken in retaliation for the exercise of a legally protected right.

U.S. v. Dickerson, 975 F.2d 1245, 1250-51 (7th Cir. 1992), cert. Denied – U.S. – 113 Supreme Court 1316, 122L.ed.2d 703 (1993) See also *U.S. v. Benson*, 941 F.2d 598, 611 (7th Cir. 1991) ("the Fifth Amendment has been interpreted to prohibit the Government from prosecuting a defendant because of some specific animus or ill will on the prosecutor's part or to punish the defendant for exercising a legally protected statutory or constitutional right"). In circumstances, not involving a legal presumption of vindictiveness, Courts have articulated a four-pronged test to aid in deciding the issue of whether a defendant has established vindictive prosecution. In *United States v. Suarez*, 263 F.3d 468 (6th Cir. 2001) the court stated the following:

> We have held that in order to show vindictive prosecution there must be (1) the exercise of a protected right; (2) a prosecutorial stake in the exercise of that right; (3) unreasonableness of the prosecutor; and (4) the intent to punish the defendant for exercise of the protected right.

The factual circumstances outlined in this memorandum clearly establish that the petitioner has satisfied the four prong test outlined in *Suarez, supra*. First there are several protected rights that Judge Cope has sought to exercise in this matter. He had a protected right to privacy in the circumstances which he himself volunteered in the privacy of his hotel room. He had a protected right to be free from charges filed without investigation and without probable cause. He had a protected right to legitimate discovery following the filing of the charges. He had a protected right to trial on the charges free of threat of retaliation if he exercised that right. The prosecutor in the case personally drafted the charges against Judge Cope knowing that no investigation was done and knowing that the evidence did not support the charges. Alternatively, by the prosecutor's own admissions as set forth herein, he drafted the charges with reckless disregard for whether they were supported in the evidence. He admitted for example that he drafted the charges with the thought in mind that the Woman was a liar. He admitted he had never even spoken to the Woman, whose testimony was critical to the majority of the charges filed. He interfered with and impeded discovery in the case for an improper purpose even after acknowledging insufficient evidence existed to establish the charges and further acknowledging that the Respondent was truthful and further stipulating to the truthfulness of Respondent, the prosecutor continued to prosecute those charges. His stake in that continued prosecution is clear. Dismissal of the charges at this juncture would establish the bad faith and misconduct of the prosecutor from the outset. The prosecutor has a personal interest in concealing the exposition of such damaging facts. It may not be disputed that the State has acted with the intention to punish the Respondent for exercise of his protective rights enumerated above.

As noted above, vindictiveness may also be part of a reason to dismiss a case for selective prosecution. Consequently the lines between selective prosecution and vindictive prosecution may become blurred. However, one clear distinction is that vindictiveness is not a required element of selective prosecution. The court in *U.S. v. Cyprian, supra* at 1195, noted the following in this respect:

> Selective prosecution is grounds for acquittal only if the basis of selection is a forbidden ground such as race, religion or political opinion. Vindictiveness motives may play a part in this decision, blurring the line between a selective and vindictive prosecution claim. However vindictive motives are not necessarily synonymous with class based prejudice or hostility and are not a required element of a selective prosecution claim.

The rules regarding burden of proof for discovery for a hearing and for resolution of the issue are the same as those discussed above for selective prosecution. *See, U.S. v. Cyprian, supra*; *U.S. v. Heidecke, supra, U.S. v. Benson,* supra. The legally protected constitutional right for which Judge Cope is being vindictively prosecuted is of course his right to trial on the charges brought. This matter is fully discussed above under the selective prosecution argument and will not be repeated here. The evidence discussed above clearly shows that the reason the State is prosecuting Counts II, IV and V, knowing they have insufficient evidence to establish such charges, is because of Judge Cope's refusal to plead guilty to Count III. Moreover, vindictiveness in the State's decision to continue to unethically prosecute those counts is clearly established by the State's threat to remove Judge Cope from office (as opposed to a reprimand or suspension) if he elects to go to trial.

Vindictiveness in this case is further established by the circumstances which compelled the formal filing of the charges without any investigation. Specifically, because the JQC was under continuous and pervasive attack in its handling of the Bonanno matter (where the JQC gave Bonanno

a total pass on a years long extramarital affair with a courthouse employee, which affair had long been rumored and was a source of scandal in the courthouse) the JQC literally focused its wrath and animus against Judge Cope in bringing the charge in Count III of Inappropriate Intimate Conduct. Moreover, the JQC brought such a charge knowing full well that the conduct was private and consensual and has never before been the subject in said circumstances of JQC charges against any other judge.

CONCLUSION

For the reasons set forth above Judge Cope requests that this court enter an order permitting appropriate discovery, setting an evidentiary hearing and dismissing the charges in this case on the grounds of selective prosecution and vindictive prosecution.

This motion seeks dismissal of charges brought against the Respondent, Judge Cope, filed without investigation, without probable cause, and ultimately without supporting evidence. Regrettably, the motion sets forth egregious misconduct in this prosecution. Neither Judge Cope nor his counsel take pleasure or derive any satisfaction whatsoever from the filing of this motion.[38] Because of the misconduct of the JQC in this case, it may be safely assumed that the immense damage done to Judge Cope in this process can never be undone.

Nothing that this commission does hence forth will truly protect Judge Cope, given the extent of the character assassination this process has wreaked. It is hoped, however, that granting the appropriate relief requested herein will signal to all the Florida judiciary, that they may in the future have confidence in, and that there is meaning to, the rule requiring an investigation be conducted before charges are filed. Other judges in the State may therefore be reassured that they will not become the next victims of a malicious prosecution.

The confidentiality under which the Investigative Committee of the JQC operates is intended properly to protect good judges from malicious and false allegations. That purpose is abandoned and perverted when the secrecy of the Investigative Panel is used to bully and perpetuate malicious charges, as has happened here.

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[38] And in fact anticipate concerted personal attacks in response.

Remedial action at this point will further ensure that future judges who find themselves confronted by the JQC may take comfort that prosecutors for the JQC will meet their ethical obligation to timely dismiss and indeed not even file charges for which there is no evidence. It will likewise help ensure that when reasonable negotiated disposition is sought, that compromise seeks to find a true common point in fact based on the evidence, rather than implicating threat, baseless charges and draconian penalties being piled on to extort a plea to something for which the judge is not guilty.

Granting the relief sought in this motion will discourage future prosecutors for the JQC from forgetting the repeated admonitions by the Supreme Court that judges are no less entitled to due process than others; moreover it will deter such prosecutors from turning an isolated event arising from alcoholism into a Roman circus featuring the execution of a judge as the main event.

Finally, every sitting judge in this state and certainly every sitting judge on the JQC should be alarmed and angered at the manner in which due process has been thrown out the window in this case to effect an indelible stain on Judge Cope's reputation. While Special Counsel apologized to Judge Cope over two months ago for the fact he had doubted Judge Cope's veracity, that apology and the facts compelling it have been disgracefully hidden from public view. Once charges are made public, the JQC has a duty to promptly and publicly exonerate the judge falsely charged. The sole legitimate purpose of the JQC is to appropriately sanction those guilty of misconduct and to protect those falsely charged with misconduct. Where, as in this case, the JQC recklessly brought the false criminal charges in the first place, the duty to rectify its own misconduct is even more compelling. Here, two lawyers (Special Counsel and General Counsel), neither of them judges, are principally responsible for a course of events which tarnishes the integrity of the JQC and must be repudiated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express to: **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission

Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, Special Counsel, Foley & Laudner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, **Louis Kwall, Esq.**, Co-Counsel for Respondent, 133 North Ft. Harrison Avenue, Clearwater, Florida 33755; this _____ day of May, 2002.

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ROBERT W. MERKLE, ESQ.